JD(NY) –41–04
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

DUANE READE, INC

AND

	CASES
	2-CA-35441
ALLIED TRADES COUNCIL	**2-CA-35558**
DIVISION OF LOCAL 338,	**2-CA-35718**
RWDSU/UFCW, AFL-CIO	**2-CA-35750**
Formerly known as ALLIED TRADES	**2-CA-35765**
COUNCIL	**2-CA-35969**
AND	**2-CA-35976**
CARLETTE BALLARD, AN INDIVIDUAL	
AND	**2-CA-36054**
CONSUELO RODRIGUEZ, AN INDIVIDUAL	

Vonda Marshall Esq., and
***Lauren Esposito Esq*. Counsels**
for the General Counsel
Tedd J. Kochman Esq., and
***Kenneth Anand Esq*. Counsel**
for the Respondent
William K. Wolf Esq. &
***Elise Feldman Esq*., Counsel for**
the Union

DECISION

I. Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard these cases in New York City over many days in March, April, May, and June 2004.

The fundamental issue in these cases, around which everything else turns, is the effort by the Allied Trades Counsel to affiliate with another labor organization, Local 338, RWDSU, AFL-CIO. The rationale for this merger was that the Allied Trades Counsel, (herein called ATC), would shortly have run out of money and gone out of business, without getting itself

attached to a stronger and more financially secure labor organization. And the reason that the ATC was broke was because about 95% of its members were employed by the Respondent and the Company had stopped bargaining with the ATC in 2001 and had ceased remitting dues.

ATC initiated a procedure in April 2003 in order to have its members vote on whether they approved an affiliation with Local 338. This affiliation effort was vigorously opposed by the Respondent, which spent substantial amounts of time and money to convince its employees to vote against the affiliation. I have no doubt that the reason that the Respondent embarked on this campaign was to put ATC out of business and to end up, at the end of the day, with a group of employees who would not be represented by any labor organization.

The Respondent argues that it had an interest in this election because ATC representatives were misusing or stealing from several of the union trust funds. But if the affiliation voted failed, this would leave the ATC with the same people as before, but if it went through, the Union would be under the supervision of a new group of people.

The charge and amended charge in 2-CA-35441 were filed on April 18 and June 27, 2003. The charge in 2-CA-35558 was filed on June 5, 2003. The charge in 2-CA-35718 was filed on August 13, 2003. The charge in 2-CA-35750 was filed on September 8, 2003. And the charge in 2-CA-35765 was filed on September 19, 2003. A Complaint and amended Complaints encompassing these charges were issued on July 31 and October 31, 2003 and on February 10, 2004.

The charge in 2-CA-35969 was filed by the Union on August 12, 2003 and the charge in 2-CA-35976 was filed by Ballard on December 8, 2003 and the charge in 2-CA-36054 was filed on Rodriguez on January 23, 2004. A Complaint based on first two charges was issued on February 27, 2004. That Complaint was consolidated with the foregoing Complaint. A further amended Complaint relating to these three charges was issued on March 4, 2003.

The Regional Director issued an Order Further Consolidating Cases along with an Amended Consolidated Complaint on February 10, 2004. On March 10, 2004, the General Counsel, after the trial had commenced, issued a Motion to Amend the Consolidated Complaint. Another Motion to Amend the Consolidated Complaint was made on May 9, 2004 and this too was granted by me.

The substantive allegations of the Complaints as ultimately amended are as follows: [1]

[1] The Respondent asserted, without being specific, that amendments contained in the Amended Complaints dated February 10, 2004 and March 10, 2004 are barred by Section 10(b). These amendments simply added the names of supervisors and contain allegations that some of these supervisors engaged in substantially the same type of conduct that already was alleged in the previous unfair labor practice charges and Complaints. (Such as additional instances of discharge threats, transfer threats, loss of benefit threats, interrogations etc. all made for the purpose of influencing employees to vote against the affiliation). As these additional allegations assert facts that are part of a same course of conduct as originally alleged, they therefore are closely related to the allegations in the timely and original set of unfair labor practice charges. Accordingly, they would not be barred by the Board's statute of limitations. *Nickles Bakery*, 296 NLRB 927, 928 (1989); *Redd-I, Inc*., 290 NLRB 115, 118 (1988).

1. That for many years, the Respondent has recognized the Allied Trades Counsel (ATC), as the exclusive collective bargaining representative for various employees at numerous (142) designated stores and that the most recent collective bargaining agreement covering such employees was effective from September 1, 1998 to August 31, 2001.

2. That since August 12, 2003, the Respondent has failed and refused to furnish the names, addresses and telephone numbers of the employees within the ATC unit as requested by the Union.

3. That since April 23, 2003, the Respondent has unilaterally and without prior notice to or bargaining with the Union, changed the terms and conditions of employment as set forth in the last contract by refusing to permit union representatives to have access to facilities covered by the ATC unit.

4. That on or about May 8, 2003, an election was conducted whereby employees represented by the ATC voted to affiliate with Local 338.

5. That in late April or early May 2003, various store managers, including Mamadou Terra and Muhammed, directed employees to sign and distribute a petition seeking the decertification of the Union.

6. That in early May 2003, the Respondent, by its store managers at Store 105, 112, 124, 126, 128, 153, 157, 224, 478, threatened employees with transfers, schedule changes, different work assignments and/or termination, if they voted for the affiliation

7. That in early May 2003, the Respondent, by its store managers at store 105, offered free lunch to employees if they voted No in the election.

8. That in early May 2003, the Respondent by its store managers at stores 207, 224 and 478, promised that if they voted No, it would provide transportation to and from the voting location and/or would pay them for the time they spent voting.

9. That on or about May 5 and 7, 2003, the Respondent, by its store managers at store 207, promised employees merit raises if they voted No.

10. That in early May 2003, the Respondent by managers, at stores 105, 126 and 128, created the impression of surveillance by telling employees that the Respondent would have a list of how employees voted in the election.

11. That in early May 2003, the Respondent, by managers at stores 112, 105, interrogated employees about how they intended to vote in the election.

12. That in early May 2003, the Respondent, at stores 111, 112, 478, required employees to display their preferences regarding the election by distributing Vote No buttons to employees.

13. That in May, the Respondent, by Geronimo at store 126, threatened employees with transfer and discharge if they did not vote in the election.

14. That in May 2003, the Respondent, by Geronimo at store 126 directed employees to sign a petition opposing the affiliation.

15. That on May 5, 2003, the Respondent, by Farhaad Jacob, at store 112, created the impression of surveillance.

16. That on May 6, 2003, the Respondent, for discriminatory reasons first transferred Leo Sharples to another store and thereafter on May 7, discharged him.

17. That on or about May 7, 2003, the Respondent at Store 105, threatened employees with the loss of benefits including health care benefits if they did not vote No in the election.

18. That on May 8, 2003, the Respondent at store 105, told employees that they could not speak with union representatives.

19. That on or about May 8, 2003, the Respondent, at store 105, engaged in surveillance of employees' union activities.

20. That on or about July 8, 2003, the Respondent at Store 126, engaged in surveillance of employees' union activities.

21. That on May 8, 2003, the Respondent, by various managers at voting locations located at the V&T Catering Hall, the Embassy Suites, the Pan American Hotel, the Roosevelt Hotel, the Marriott Hotel, **(a)** required employees to display Vote No buttons; **(b)** posted banners directing employees to vote No; **(c)** threatened to discharge employees who voted Yes; **(d)** encouraged ineligible employees to vote in the election; **(e)** directed employees to vote No; **(f)** engaged in surveillance of employees' union activities by photographing employees outside the voting location and watching employees while they waited to vote, **(g)** took union literature away from employees, **(h)** intimidated employees by surrounding them as they got off vans; **(i)** escorting voters into the polling area; **(j)** posting Vote No banners during the election at several voting locations; and **(k)** reimbursed employees for cab fare to the election locations.

22. That on May 8, 2003, the Respondent, by various managers, threatened to initiate police action against union representatives if they refused to cease speaking with employees at the Respondent's stores.

23. That in late May 2003, the Respondent at Stores 113, 127, 147, initiated police action against union representatives.

24. That on May 6 and 7, 2003, the Respondent, for discriminatory reasons, transferred Leo Sharples from Store 125 to Store 321 and thereafter discharged him.

25. That on May 10 and 19, 2003, the Respondent, for discriminatory reasons, suspended and discharged Edward Cave.

26. That on August 17, 2003, the Respondent, for discriminatory reasons discharged Consuelo Rodriguez.

27. That on or about September 9, 2003, the Respondent at store 115, engaged in surveillance of employees' union activities.

28. That on or about September 9, 2003, the Respondent at store 117, in the presence of employees, initiated police action against union representative Basil MacDonald.

29. That on or about December 3, 2003, the Respondent, by Omar Nicholson, at store 157, **(a)** instructed employees to solicit customers to sign a petition in opposition to the affiliation; and **(b)** forged employee signatures on petitions in opposition to the affiliation.

30. That in early December, 2003, the Respondent by Churchill Jack at Store 157, **(a)** promised pay raises if employees would sign a petition in opposition to the affiliation and solicit customers and other individuals to do the same; **(b)** interrogated employees about whether they signed a petition in opposition to the affiliation; and **(c)** promised benefits and provided employees with benefits for soliciting the public to sign a petition in opposition to the affiliation.

31. That on December 3, 2003, the Respondent, for discriminatory reasons, discharged Collette Ballard.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

II. Findings and Conclusions

1. Jurisdiction

The Respondent admits and I find that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The status of the Charging Party as a labor organization is somewhat more complicated and will be discussed below. However, for purposes of Section 2(5) of the Act, it is clear that both Allied Trades Council and Local 338, RWDSU, AFL-CIO are labor organizations within the definition set forth in 2(5) of the Act.

2. Background

The Company has recognized and bargained with the Allied Trades Council, herein called ATC for over 40 years. As of 2003, there were 142 stores where the employees were represented by ATC. The last collective bargaining agreement covering the employees in these stores ran from September 1, 1998 through August 31, 2001.

At the same time the Company, for many years, has recognized and bargained with another labor organization called UNITE on behalf of similar categories of employees at other stores.

The Board in a Decision reported at 338 NLRB No. 140, (April 2003), held that in the Spring of 2000, the Company violated Section 8(a)(1) & (2) of the Act by illegally recognizing

and giving assistance to UNITE in relation to eight of its stores. In that case, the Board affirmed the Judge's conclusions that James Rizzo, its Vice President of Human Resources, favored Unite and unlawfully colluded with that union because UNITE had offered the Company a good financial deal. Additionally, the Board approved the Administrative Law Judge's finding that the Company **(1)** engaged in unlawful surveillance, **(2)** directed employees not to talk to ACT representatives, and **(3)** confiscated and tore up authorizations cards distributed by ACT. I further note that the Judge discredited certain aspects of Rizzo's testimony when it conflicted with the testimony of John Morro, the President of ACT. Moreover, in discussing the testimony of Seymour Stein, a manager who figures prominently in the present case, the Judge stated that his testimony was untruthful and fabricated.

Negotiations for a new contract commenced on September 14, 2000 and the bargaining is described by Judge Eleanor MacDonald, in a decision affirmed by the Board at 324 NLRB NO. 104. (September 15, 2004. These were negotiations for a new contract to replace the contract that was set to expire on August 30, 2001.

While those negotiations were going on, UNITE filed a petition with the Board seeking to replace ACT as the representative of the employees in the stores represented by ACT. Pursuant to a Decision and Supplemental Decision respectively issued by the Regional Director on August 3 and October 19, 2001, a mail ballot election was conducted in October 2001. The vote was counted on October 19, 2001 and ATC defeated UNITE in the two units; one consisting of pharmacists and the other of cashiers, stock persons etc. UNITE's Objections to the Election were overruled on December 16, 2001 and ATC was certified after the Board rejected UNITE's appeal. [2]

When the results of the election became known on October 19, 2001, the Union increased its contract demands and threatened a strike. Further negotiations were had and each side modified their positions.

On December 6, 2001, the Company made a last and final offer to ACT. When this was rejected, the Company put into effect the terms of its final offer, which among other things, meant that it ceased making contributions to the previous contract benefit funds. More significantly for purposes of this case, it stopped remitting employee dues to the Union pursuant to the expired contract's check off and dues deduction clause. (As noted above, this effectively caused the Union to lose most of its source of revenue).

Also relevant to this case, the Company put into effect a provision of its final offer, which purported to modify the visitation clause in the expired contract. The expired contract, at paragraph 2 read:

> The Employer agrees that authorized representatives of the Union shall be permitted to enter the Employer's place of business <u>at any</u>

[2] I will assume that in accordance with standard procedure and *Excelsior Underwear*, that both unions had been provided by the Company with a current list of the employees' names and addresses.

> time for the adjustment of disputes, grievances or any other matters that may require their presence. (Underlining for emphasis)

In relation to the bargaining and the December 6, 2001 final offer, Judge MacDonald concluded that the Company bargained in bad faith and that there was no valid impasse at the time that it implemented the terms of its final offer. I also note that Judge MacDonald concluded that Rizzo inaccurately testified that the Union had not reduced its wage demands in response to the Company's December 6, 2001 proposal and that this evidenced his "determination to declare an impasse no matter what the Union may have done." In this regard, I note that the Board may rely on findings and evidence in earlier case as background in subsequent case against the same respondent. *Stark Electric*, 327 NLRB 518 fn. 1 (1999).

The next two years went by without any effective representation by ACT on behalf of most of the employees it represented at Duane-Reade. This was not due to any action by the Union, but rather the result of the Company's refusal to bargain, along with the ongoing investigations and litigations described above. [3]

In the meantime, a lawsuit was initiated in 2001 and which is titled *Lisa Bona et al, v. George Barasch et al*. 01 Civ. 2289. This lawsuit accused ATC, its officers, its employees and the trustees of its dues and benefit funds of engaging in various illegal acts of self-enrichment, conflicts of interest and breaches of fiduciary duty. Put bluntly, the lawsuit essentially accused the defendants of being a bunch of crooks.

On March 18, 2003, Judge Michael B. Mukasey, a United States District Court Judge, issued an opinion on the Defendants' Motion for Summary Judgment. In this Opinion, and for the purpose of ruling on the Motion, Judge Mukasey assumed that the facts as pleaded in the Complaint were true. He therefore *did not make any findings of fact* and merely decided that certain legal claims, (but not others), could go forward based solely on the Complaint's allegations.

The Respondent in its Brief asserts that the principle focus of its campaign to convince its employees to vote against the affiliation centered on explaining Judge Mukasey's opinion to them. We will come back to this. [4]

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[3] In *Duane Reade*, 338 NLRB No. 140, the charge was filed on August 22, 2001 and the hearings were conducted in December 2001 and February 2002. In the later case before Judge MacDonald, the hearing was conducted in March 2003.

[4] Subsequently, on June 16, 2004, Judge Mukasey concluded that the plaintiffs' depositions showed that because UNITE, [which had been illegally assisted by the Company back in 2000], held "the purse strings to this litigation," and "Unite has a strong motive to use this litigation to destroy ATC," plaintiffs' counsel was unable to litigate the case, "in the sole and best interests of the class." The Judge also concluded that the plaintiffs were not adequate class representatives, as they "are, or at least may become, little more than instruments of UNITE." Thereafter, on July 12, 2004, Judge Mukasey issued another decision that dismissed the plaintiffs' claims against John Morro and Rey Rosado insofar as they were pled under Section 501 of the LMRDA. He found that the plaintiffs lacked standing to make claims under that Section because they no longer were members of ATC. The Respondent objected to me reading or making any conclusions about these subsequent decisions by Judge Mukasey in the *Bona v.*

Continued

3. The First Affiliation Vote on May 8

In February 2003, (and contemporaneously with Judge MacDonald's decision), ACT began seeking a partner to affiliate with.

On April 7, 2003, ACT entered into an affiliation agreement with Local 338 that provided for the holding of a vote by ACT's members either by manual or mail ballot vote. A meeting was set up to be held on April 15, 2003 at the Roosevelt Hotel in Manhattan where officers of ACT and Officers of Local 338 would be available to explain the affiliation.

On April 14, 2003, Rizzo e-mailed a memorandum to the Company's managers, which read: [5]

> Please open the attached immediately, copy and hand out to each employee in your store, including all pharmacy personnel. A highlighted copy of the referred to "Judges Decision" will be hand delivered to your store today or tomorrow morning. It should be available for everyone to see. [The Judge's Decision refers to the one by Judge Mukasey]. It is important that all employees know that we will not be excusing anyone to attend the Allied Trades meeting scheduled for 4/15/03. No employee is allowed to go to meetings on company time and we have not excused anyone. Employees should know that they have no obligation to attend this meeting….

The attachment to the above e-mail stated:

> On Thursday, April 10, 2003, Allied Trades council, after months of inactivity and nonrepresentation, announced its intention to seek a merger with another Union – Local 338, RWDSU. In order to make this happen, they must seek approval from you. They intend to do so by ballot, which will be mailed or handed to you to complete by May 8, 2003.
> **DUANE READE IS OPPOSED TO THIS MERGER** and we want you to be aware of this. We do not believe this merger is your best interest and we encourage you to **VOTE <u>NO</u>** when you receive this ballot.
> A Federal Judge recently pointed out that Allied Trades Council collected union dues, YOUR MONEY, has been diverted into trust funds that had no union purpose, that benefit funds collected on

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Barasch litigation. Since I could receive the original decision that was offered into evidence by the Respondent as a matter of official notice, I see no reason not to receive and consider, via official notice, Judge Mukasey's follow-up decisions in the same case. (These were issued after the hearing in this case closed.) As the decisions were reported in Westlaw, they are self authenticating and do not require that the present case be reopened.

[5] By coincidence this is also the same day that the Board issued its Decision in 338 NLRB No. 140.

> your behalf, may have been siphoned off for personal use through administrative tricks ($10 million dollars over the past six years), rather than being used to improve benefits. This decision is in your store and available for you to read and you should read it. Before you trust your interests with these same representatives, you should be aware that Duane Reade feels that they have been misusing your money for years to fund their own personal interests. **You should decide if you want this merger**.
>
> Duane Reade and only Duane Reade can provide jobs, salary and benefits to the best of its ability. No threats can change that. No matter what you are promised or told by third parties, if Duane Reade does not agree or cannot provide no UNION can deliver. We have and will continue to provide jobs, salary and benefits over these past years, even when this so-called UNION disappeared when it found it did not have your support. DO NOT change that. **VOTE NO** on the ballot you receive and send a message to these guys that you know what they did and that you will not stand for it anymore.

I note that this message conflates the idea of voting against the affiliation with the idea of voting against having any union representation. I also note that Patricia Thompson, an employee at 95 Wall Street credibly testified that her store manager, Muhammed Dessouki told the employees to read this document and understand it or they could get fired.

On April 15, 2003, representatives of ACT and Local 338 were present at the Roosevelt Hotel for the better part of the day where they spoke to employees who came to the hotel and explained to them the reasons for the affiliation and how it was going to take place.

On or about April 15 or 16, 2003, Rizzo and Stein met with the District managers to discuss the affiliation vote and to instruct them what to tell the store managers to say to the employees. At this meeting, the District Managers were given a two-page document outlining statements that were to be made to employees. This stated in pertinent part:

> Duane Reade is opposed to this affiliation…. This is a last minute desperate act to attempt to salvage their agenda with money that the Company had paid into funds for the benefits that few if any of our employees ever received. When we, through lawful negotiations, attempted to correct this, we were stonewalled. We now have proof of what we suspected then, that the contributions we have made to the Union's funds did not go to benefit our employees. The only reason ATC would not deal with us is that they wanted to continue to operate the Funds for their own selfish purposes. (Refer to the decision handed out to you.)…What is Duane Reade going to give me if I vote NO to this affiliation? As stated above, we cannot promise or threaten employees to influence the vote. However, we have always felt that our employees do not need a Union to represent them. While it is their protected right to join Unions, we have never felt that dealing

> collectively through a third party was necessary…. [W]e are lawfully bound to bargain wages and benefits collectively. While that responsibility does not go away with a NO vote to this affiliation, it is our belief that this is not what the majority of our employees want. They would rather have the freedom to deal with us directly and why not. The Union says in its literature that they will get us more money and improved benefits? ATC would have you believe that this affiliation would gain them what they could not accomplish as an independent union. No matter who they try to affiliate with, they cannot "force" a company to agree. Duane Reade will not commit economic suicide and agree to terms it could not agree to months before.
>
> * * * *
>
> Prompt discussions with all store employees on your visits. Advise where you get major push-backs from an employee(s). Do not leave this with anyone. NOT EVEN YOUR MANAGERS. This script is a guideline for discussion only. [6]

The other document given to the Store Managers at this meeting was an underlined copy of Judge Mukasey's opinion. The testimony shows that the District Managers understood that they were to instruct the store managers to point out, and if necessary, to show employees the highlighted portions of the Judge's opinion and to tell them that these "facts" were the findings of the Judge. Without going into detail, the highlighted portions of the Judge's decision, which were presented to the employees as findings of fact, essentially accused various union officers of being crooks who were misusing union funds. As the Judge's opinion did not purport to contain any "findings of fact," it is obvious to me that the store managers were essentially instructed to misrepresent what the opinion was and to misrepresent that the people associated with ACT had, in fact, been found by a Federal Judge to have engaged in what would amount to the misuse of funds. [7]

On April 16, 2003, the Company by Seymour Stein, its Director of Human Resources e-mailed a memorandum to managers that stated:

> This E-mail is to inform you that local 338, RWDSU is sending their representatives into Allied locations to entice our employees to vote for the proposed merger with Allied Trades counsel.

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[6] Since this purports to be a guideline for the store managers to use when talking to employees, it is somewhat strange to me why the District Managers were instructed to not leave this document in the stores so that it could be consulted.

[7] I should note here that the allegations in *Bona v. Barsch* were not a proper subject of litigation in this case. Therefore, I have absolutely no opinion as to the truth of the allegations made in that case. The relevant point here is not the truth or falsity of the allegations, but that in the context of the affiliation election, the Company misrepresented to employees that a Federal Judge had concluded that these allegations were true. To me this is a material misrepresentation which reasonably could have led the employees to vote against the affiliation.

* * * *

> Should Allied representative visit your location, you are to approach them and ask for I.D. when they present you with said I.D. you are to explain to them that if they are in your location to solicit y our employees, they must leave. If more than one representative visits your location you may ask for one to leave. Allied may only be in your location regarding employee grievances.
>
> This e-mail is to reinforce existing procedures already in place. To reiterate no persons may solicit our employees on Duane Reade property whether it is Allied or Local 338….

On April 17, 2003, the Company faxed a memorandum for distribution to employees that stated:

> You are not to speak to any Allied representatives while at work. If you fail to follow this simple rule, you <u>will</u> be terminated on the spot. Any questions speak to the manager.

Commencing around mid April 2003, representatives from ACT attempted to visit stores in order to notify employees about the upcoming affiliation vote. On many occasions they were successful in leaving literature for employees at the stores. On other occasions they were met by store managers who told them that they had to leave. There is no dispute that the union's representatives did not notify the Company before making the visits and that for the most part, they were not for the purpose of dealing with employee grievances. In this respect, the Union concedes that it did not attempt to comply with the terms of the Company's proposed modification of the visitation clause made in the final offer, on the grounds that in the Union's opinion, the provisions of the expired contract were still controlling.

Also in April and early May 2003, ACT and Local 338, mailed notices to employees in the mail concerning the upcoming election that was scheduled to take place on May 8, 2003. For this, the Union used an older list of employees' names and addresses. In this regard, although ACT had requested an updated list, the Company did not deliver one until May 5, 2003.

The election was scheduled to take place on May 8, 2003 and the American Arbitration Association was contracted to run the election. This election was set up so that the current employees would vote manually at five locations in New York City. Retirees would vote by mail ballot. (This was because many retirees had left New York and lived elsewhere).

The election was to take place over a 13 hour period from 7:00 a.m. to 8:00 p.m. at the Embassy Suites in lower Manhattan; the Roosevelt Hotel at 45th Street and Park Avenue; the Marriott Hotel in downtown Brooklyn at Metrotech; the V&T Catering Hall on Webster Avenue between 177th and E. Tremont Avenue in the Bronx; and the Pan American Hotel on Queens Blvd., in Queens. Included in the instructions given to employees, were maps and instructions on public transportation means to get to the polling places. Eligible to vote were full time employees who had been employed for at least 90 days. Also eligible were retirees.

At each election site, there were two AAA representatives and an observer from Local 338. Also, a computer was set up with an internet connection so that communications could be made. An employee could vote at any of the voting sites as long as she had identification and her name was on the eligibility list.

Except for two stores on Staten Island and a few stores in Brooklyn and Long Island, the rest of the stores were within walking distance of, or within easy public transportation of the polling places. Thus, I received into evidence an exhibit that shows that almost all of the stores are on subway lines leading to one or more of the voting places. And in the case of the Westchester stores, these are near the Metro North RR, which goes right into Grand Central Station, which is near the Roosevelt Hotel. Also, as the polling hours encompassed times before and after employees' normal work shifts (8 hours), the vast bulk of employees had sufficient time to get to or from the polling places on their own time and without missing work.

On May 1, 2003, a group of Duane Reade employees filed an Order to Show Cause seeking to enjoin the election. These were Sharmen Ramsey, Maxine Isaac, Rosemary Cacioppo and Danielle Gomez and these individuals were represented by Joseph Fine of Reitman and Personnet. They contended that the eligibility rules were improper because the Unions were allowing non-members to vote who were employed for more than 90 days by Duane Reade. (Presumably, the reason that non-members were allowed to vote in this internal union election was because most employees who had been represented by ATC had lapsed in their dues' payments). A hearing was held before Judge Dennis M. Cavanaugh on May 5 and he concluded that the plaintiffs had no standing and that the eligibility rules were reasonable. The Judge dismissed the suit on the same date. An Order to that effect was entered on May 9, 2003.

On May 1, 2003, Rizzo sent a memorandum to employees urging them to vote against the affiliation. This was handed out to the employees with their pay checks.

Also in early May, the employees were presented by the Company with another memorandum urging them to vote against the affiliation. This stated in pertinent part:

> Can you Trust ATC? Mr. Morro and Mr. Rosado have been accused of giving away dues money - $1,000,000 of your money to a fund in which they have received personal benefits. Ask them about it.
>
> ATC/Local 338 made statement that they will bargain to return employee's benefits to the allied welfare and pension funds.
>
> Most of the money that Duane Reade paid to the funds on your behalf did not go to your benefit but instead to administrators who are all related to the Barasch family. (As much as $10,000,000 over the past 6 years).
>
> That's why they want you back in the Fund. Very little of what was collected from your paychecks was ever used by employees. This is real money that the company could have used to improve wages and benefits for you. We would like to have had that

opportunity.

Affiliation Agreement does not guarantee that the plans can be merged. It states… that it will be considered after a year. What does this mean – Can you trust ATC?

Local 338's last posted pension filed tax return was for the year 2000. What are they hiding?

If this vote is approved, what health and pension plans cover you and your family? The Company's benefit plans are already in place. Remember what ATC did to you in December 2001.

Duane Reade has improved average salaries each year. How much might they have grown without the huge benefit cost paid to the benefit funds on your behalf with little being use, except by fund administrators.

Only a company provides jobs, no union or affiliation does. To seek its objective, unions can strike, slow down, protest and fine its members.

In an economic strike, the company has the right to replace workers to service our customers.

Think again – Is this union's objectives your interest or theirs.

VOTE NO

Patricia Thompson credibly testified that in early May 2003, assistant managers at her store solicited employees to sign a petition that stated:

WE THE UNDERSIGNED HAVE SIGNED THIS PETITION ON OUR OWN FREE WILL THAT WE DO NOT WISH TO BE REPRESENTED BY THE ALLIED TRADES COUNCIL

Also in early May 2003, a two page poster was put up in the lunch room of one of the downtown stores which, on one page shows a person putting a ballot in a box and on the second page shows cartoon characters with bags of loot who are dressed as crooks and represented to be from ATC and Local 338.

The election was scheduled for May 8, 2003. The Unions decided to not give rides to people who might need transportation, in part, because of the fear that if someone got into an accident, they might be liable for damages.

The Employer on the other hand, decided that it would provide transportation to the employees and contracted with a bus company to provide vans and limousine service. In this respect, the transportation was provided even where employees were within walking distance of,

or within a subway or bus ride of the polling places. [8] In connection with the Company's arrangements, Rizzo testified in another proceeding;

> Q. When you gave people rides to the polls there was a manager in every car; isn't that true?
> A. There was a driver and a manager, yes.
> Q. Driver, a manager and employees in very car?
> A. Yes that is correct.
> Q. And the employees were handed "vote no" buttons before they got in the car, isn't that correct?
> A. Either before they got in the car or during the ride.
> Q. And they were urged to vote no during this ride, isn't that true?
> A. Absolutely true. [9]

Leelavathi Rampersaud, employed as a cashier at a store on 47th street and Lexington Avenue, testified that on May 2, 2003, store manager, Farhaad Jacob asked if she wanted ATC to represent her. She said yes and he told her that she was not to speak to any of the other employees about that union. She also testified that on Monday, May 5, 2003, Farhaad asked her how she was going to vote and insisted that she give an answer because he said that he had to send all the names into the office; that they needed to know who was is going to vote yes and who was going to vote no. (Recall the statement on Respondent Exhibit 60 which stated: "Prompt discussions with all store employees on your visits. Advise where you get major push-backs from an employee(s).") During the course of this conversation, Rampersaud also testified that Jacob told her that she might be transferred and/or that her schedule could be changed.

According to Rampersaud, on May 7, Farhaad, over the course of the morning asked her if she had made a decision. She testified that she told him that she would vote no if he gave her a

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[8] Rizzo testified in this proceeding that either a store manager, a district manager or a pharmacy supervisor was in every vehicle that the Company used to transport people to the polling places. He also testified that the employees were paid for the time they spent away from the store going to and from the vote. Rizzo asserted that the reasons for this was to make sure that a large number of employees voted and also to make sure that the employees would get back to the stores in time so that there was sufficient coverage at the stores. Inasmuch as the polls were open before and after employee shifts and as most employees could get to the polling places either by walking or by public transportation, I find that this rationalization is false.

[9] The vast bulk of the evidence shows that the Employer arranged to provide transportation to the election sites for its employees, while they were still on the clock. It is my opinion that it did so in order to keep these employees under surveillance and to create a herding effect, in an effort to affect their votes. Although there were a couple of people who testified that they were told by managers that if they wished to vote no, they would be provided with transportation and would continue to be paid, the overwhelming evidence is that the Employer did not condition the transportation or pay on how people voted. On the contrary, its aim was to get as many people as possible to the election sites and to do so under conditions that could reasonably be said to pressure them to vote against the affiliation. While I obviously do not feel that the Employer's actions here were altruistic or "neutral" I cannot say that the offer of transportation or pay for time spent voting, constituted a violation of the Act. See *New Era Cap Co*., 336 NLRB 526 (2001).

signed note telling her that she should vote no. Farhaad responded that he couldn't do that. Rampersaud also testified that in the afternoon, she overheard Farhaad talking on the phone about giving out Vote No buttons and saying that if employees refused a button, they would know who was going to vote yes and who was going to vote no.

Rampersaud testified that on May 8, at about 10:30 a.m., Farhaad walked with her and two other employees to the Roosevelt Hotel, (about 3 blocks away), and told them to make sure that they wore the Vote No buttons and to make sure that they voted against the affiliation. She states that he told them that the Company would find out who voted yes and that if they voted yes, he would have no choice but to transfer them. She testified that she took a Vote No button because she was afraid that she would be transferred. Rampersaud also testified that Farhaad walked with employees into the Hotel, took them upstairs to the second floor where the election was being conducted and finally left. She testified that when they arrived at the hotel, the Company had a group of managers and supervisors standing outside the entrance.

Although Farhaad Jacob denied making the statements attributed to him by Rampersaud, I am going to credit her version of the events. I thought that she was a credible and forthright witness. Also, some of her contentions were consistent with the testimony of other employees who received similar statements from other supervisors. For example, night manager Eddie Ibea essentially admitted that he told employees at his store that if they voted for the affiliation, they would be transferred.

Consuelo Rodriguez, who worked at a Bronx store until her discharge in August 2003, testified that on May 7, 2003, her store manager, Mohammed Mazid, stated that the Employer wanted the employees to vote against the affiliation and asked her if she was going to vote no. She responded that this was supposed to be private, to which he said, "no, no, you can tell me." She testified that he said something about a Court decision and that ACT was not using the money right and that if she wanted a good union, she should consider UNITE. Mazid also told her that the Company was going to drive the employees to the polling place.

According to Ms. Rodriguez, on the following day, (election day), she took a bus before work and went by herself to vote. She testified that when she arrived at work, Mazid called her into his office and asked her if she had voted. Rodriguez states that she told him that she hadn't voted yet and he said that he would take her over to the polling place with the other employees. She then told him that she had already voted and credibly testified that Mazid got upset and said, "you voted without knowledge, pray that everything is okay."

Helen Egan, who worked in a Staten Island store, testified that on May 7, 2003, the store manager and the District Manager, Ryan Moore spoke to the employees and told them that if they voted no, they would get their hours back, (they had been cut after the Christmas season), and that they would get merit raises. She also testified that the employees would be given a ride to the voting place and that there were ways that "they" would find out if we voted in favor of the affiliation. Egan testified that Moore further said that if they voted yes, that there were consequences; that they wouldn't get their raises and wouldn't get their hours back.

As I conclude that Egan was a credible witness, I find that she was promised benefits if employees voted against the affiliation; that she was given the impression that the employees' votes would be subject to company surveillance and that she was the recipient of a statement that

threatened reprisals if employees voted for the affiliation.

Lizzelle Morris, who worked at the store on 42nd street and Lexington Avenue, credibly testified that during the week before the election, store manager Mamadou Terra and assistant manager Aisha Kahn, on several occasions, asked her how she was going to vote and told her to vote no. On cross examination, Morris added that Terra told her that the Union was bad for the Company and that if the employees voted "yes" a lot of jobs would be lost.

Morris credibly testified that on May 7, 2003, Devindra Sanger, a supervisor, came to speak to the employees in the store and said; "If you guys vote yes for the merger, by the next day you're not going to have any medical benefits, no benefits whatsoever, because Duane Reade don't have to provide you with benefits. They doing you a favor." Morris also testified that Sanger showed the employees the Court decision, [the opinion of Judge Mukasey] and said that the ACT people were using the employees' money to go on trips to Italy. Morris states that at one point, Sanger asked the employees how they were going to vote, to which she said that she was not going to vote at all. She states that he said that he was not going to leave until she agreed to vote no. According to Morris, she agreed to vote no just to get him off her back.

Morris testified that on May 8, 2003, she was asked to watch a delivery outside the store and was told by Kahn not to speak to the union representatives who also were on the sidewalk. She testified that when she walked out the door, she saw Kahn looking at her through the store window. Morris testified that later in the day, Terra asked her if she was going to vote and that when she responded that she would do so on her own time, Terra stated that the district managers had a list of people who were going to vote and that when she arrived at the polling place, they were going to scratch off your name.

With respect to credibility, I note that Mamadou Terra was not called as a witness by the Respondent and therefore did not deny the testimony given by Morris. In its Brief, the Respondent asserts that it did not call Terra because he was unavailable. But this assertion was made without any foundation and I have no evidentiary basis for finding that he was not available. Was he out of the country? Was he sick or dead? Or did counsel suspect that Terra's testimony would have hurt Respondent's case if called?

Insofar as Morris' testimony, it is clear that she was the subject of unlawful interrogation, threats of job and benefits loss, as well as being given the impression that the employees' voting on May 8 would be subjected to company surveillance. However, as to the contention that she was the subject of illegal surveillance on May 8, 2003 when Khan looked out of the store window, it is my opinion that the testimony on this is too ambiguous to make out a violation of the Act. Kahn could simply have been looking to see when and how the delivery was made.

Patricia Thompson, who worked at a store on 95 Wall Street, credibly testified that her manager, Muhammed Dussouki, gave her a Vote No button and that she responded that she was not going to wear the button and was going to vote the way she wanted to. According to Thompson, Dussouki said that she should know how to vote if she wanted to keep her job; that if employees didn't vote no, they could lose their jobs or be transferred to a store far away from where they lived. She also testified that another store manager, Geronimo told her the same thing. According to Thompson, on May 7, Muhammed told her and other employees that they were lucky to have jobs and that they should vote no to keep their jobs. She responded that he

couldn't tell her how to vote. She also testified that on May 8, Dussouki told the employees that they had to vote and that he had a van to pick them up and take them to the polling place. (This would be at the Embassy Suites Hotel, which is less than 10 blocks away). [10]

Edward Cave, (also the subject of an 8(a)(3) allegation), testified that on May 6, 2003, night manager Eddie Ibea told Cave that it was important for him to vote in the election. When Cave asked if employees would get into trouble if they voted in favor of the affiliation, Ibea said that if they voted yes, they would get transferred to a store far away from their homes. Cave also testified that Ibea told him that if employees voted yes, "everybody's job would be on the line."

With respect to the above, I note that when Ibea was called to testify by the Respondent, he admitted that he told employees that if they didn't vote the way the Company wanted they would be transferred to other stores. Thus, while I originally thought that Cave's story seemed a little implausible, it turned out that his version of this conversation was correct.

Cave further testified that on the morning of May 8, 2003, after he had gone home from the night shift, he received a phone call from store manager Cox who told him that he had to come back to the store because a bus would come to pick up the employees and take them to vote. Cave credibly testified that when he asked Cox if he would be fired if he didn't return, Cox said yes and that Cave would see what happened if he didn't return to the store.

Leo Sharples credibly testified that on May 6, store manager Edwin Rivera told him and other employees that if they didn't vote against the affiliation, they would be transferred to a distant store and would be forced to quit.

Yvette Daniels credibly testified that on the morning of May 8, 2003, store manager Churchill Jack spoke to employees and told them that he had to accompany them to the vote and that the employees should vote against the affiliation. She further testified that he said that management would be in the room and would find out how they voted; that if they voted against affiliation they could get a raise, but if they voted for affiliation, they would be transferred or discharged. (Daniels was employed at the store located at Third Avenue and 58th street).

(a) Events at the Pan Am Hotel

The Queens, New York polling place was at the Pan American Hotel located on Queens Blvd. The persons running the election were representatives of the American Arbitration Association, (AAA). Local 338 had one observer and another person in the voting room who was in charge of making sure that the computer connection was working. In addition, there was another person who showed up and who was allowed to be present. This person's name is Sharmen Ramsey, a cashier from one of the stores who was allowed to be present as an observer for a group of what purported to be a group of dissident employees who opposed the election and who had filed a civil action seeking to cancel it. (This was described above at page 13).

[10] Thompson testified that she went on her own to vote before coming to work and told this to Dessouki when she arrived. Although her testimony regarding his reaction is a bit confused, it seems that he was upset that she voted on her own and didn't wait for the van to take her and the other employees to the polling place.

The first group of people to show up at the Pan Am Hotel were two District Managers of the Respondent who went up to the second floor where the election was to be held, and they set up a table and chairs and unfurled a large banner urging employees to vote against the affiliation.

When Local 338's representatives arrived at the hotel and went to the second floor, they were surprised to see Respondent's agents in the hallway and told them that they had no business being there. When the Respondent's agents refused to leave, the Union's agents contacted the hotel manager and ultimately, after some give and take, the company people were told they had to leave the hotel or they would be forced to leave by the hotel's security. The company agents did not leave the second floor until around 7:15 a.m. which is after the polls were scheduled to open. When they did leave, they then stationed themselves right outside the entrance to the hotel and put up the banner.

During the course of the day, company District Managers and store managers remained stationed outside the hotel entrance. When employees arrived in the vans contracted for by the company, they greeted the employees and either escorted them or directed them into the hotel lobby. Many employees who arrived wore Vote No buttons that had been given to them either before or during the ride to the hotel by managers. Carlos Sanchez, an organizer from Local 338 testified that he noticed that some of the Duane Reade managers appeared to have lists and seemed to be checking off names as employees showed up to vote. Sanchez did not, however, see the papers and couldn't say for sure that these were employee lists.

(b) Events at the V&T Catering Hall

This voting location is on Webster Ave in the Bronx. The voting room was on the second floor and the polls were to open at 7:00 a.m.

When the union's representatives arrived that morning, they discovered that Duane Reade managers had set up a table and chairs on the first floor. After consulting with the hotel and confirming that the Union had rented the entire place for the day, the Duane Reade people were told that they had to leave the premises. They left, but set up outside the entrance. They also put up a banner that said; "Duane Reade would like you to vote no."

Duane Reade District managers and store managers stationed themselves outside the entrance for the remainder of the day and store managers accompanied employees to the polling place from their stores. Upon arrival, many employees were escorted by store managers into the building. Relying on the testimony of Rizzo, I will conclude that management either before or during the rides to the polling places asked and/or told employees to wear Vote No buttons.

At one point during the morning, a young woman showed up in the voting room who identified herself as being sent by UNITE to act as an observer. Also a man and woman showed and claimed that they had been sent by the Company to act as observers. Thomas Baez, a Local 338 agent, testified that during the time they were there, he saw that these people were writing things down as employees came in to vote. Ultimately, according to Baez, the two people who identified themselves as observers for Duane Reade were told to leave by the AAA and the person who claimed that she was from UNITE was allowed to stay. None of these people were identified during the trial and there was no non-hearsay evidence to establish that the two

individuals who claimed to be acting on behalf of the Company were agents of Respondent. [11]

Baez testified that he observed occasions where he saw what appeared to him to be camera flashes from inside vans that transported employees to the polling places.

Carl Diaz testified that he went to the store on Westchester Ave. and while there was approached by a person who identified himself as a Duane Reade manager and who said that the manager of the store was telling the employees there to vote no and threatening them with their jobs.

Diaz also testified that on this day, he was at V & T for some of the time and that some employees who arrived by foot, told him that they thought that this was a secret ballot vote. Diaz testified that he assured them that it was secret, but they said it was easy for him to say and that they turned around and left.

Baez testified that a number or employees who came to the hall told him that they were told that it wasn't a secret ballot election and that the Company would find out how they voted. Baez states he told them that this was not true and that it was a secret ballot election and that no one would know how they voted. (The testimony of Baez to the effect that certain employees were told this by supervisors is, of course, hearsay).

Finally, Baez testified about some employees who voted in Brooklyn but who showed up to vote again at V&T. They were challenged and did not vote again.

(c) Events at the Embassy Suites Hotel

The Embassy Suites Hotel is located in lower Manhattan and is within walking distance of a large number of the Respondent's stores. The election was to be held on the 9th floor and was run by two AAA agents.

The polls opened at 7:00 a.m. and at about 7:15 a.m. a security officer from the hotel notified Sergio Diaz from Local 338 that a group of Duane Reade people were on the floor where the vote was being held and were wearing Vote No buttons. When they were asked who they were and what they were doing there, these individuals identified themselves as Duane Reade managers and were told to leave the building. After putting up an argument and saying that they were there to greet voters, these people finally left when they were told that they were trespassing. Instead of leaving the building, Duane Reade managers went down to a coffee shop in the lobby of the hotel and remained there or outside the entrance for the remainder of the day.

During the course of the day employees were driven to the hotel accompanied by store or district managers and upon arrival were escorted by them into the hotel, and at times up to the voting room on the 9th floor. Voters were given Vote No buttons by the Company either before

[11] It is not sufficient to prove agency by the statements of a purported agent that he or she is an agent. One must show by competent evidence that the principle has either designated the person to be his agent or that the principle has acted in such a way that the person has apparent authority.

or during the ride over to the hotel. And according to Diaz, he heard at least one of the Duane Reade managers ask employees as they arrived; "You're voting no, right? You do know how to vote no?" Union witnesses also described situations during the day where upon arrival at the hotel, employees after exiting the vans were surrounded by managers and physically escorted past the union's representatives in such a way that it was difficult for the Union to talk to them or hand out literature. (Respondent's witness Devindra Sanger essentially admits this).

Diaz and Pezenik testified that they saw managers engaging in activity that looked like they were keeping a list of the voters. But they couldn't say for sure that this was the case.

In a couple of cases, Diaz testified that employees showed up who were not eligible to vote and returned saying that they were told that they could vote. (Their votes were challenged).

Diaz also testified that during the morning, two people showed up in the voting room, sat down and watched the election as it was going on. When finally asked who they were, they gave their names as Grace Hagan and Gyasi Kay and said that they were sent by Jim Rizzo to act as observers for management. Diaz further testified that on one occasion, (before they were kicked out of the room by the AAA representatives), Hagan took a paper from a voter who was registering to vote, said "you don't need this," and tossed it into the garbage pail. In addition, the General Counsel offered evidence that another woman named Nadia came up to the voting room and said that she was sent by Rizzo to replace Gyasi Kay.

Although the General Counsel offered evidence showing the identity of these individuals, the evidence does not show that they held any managerial or supervisory positions with the Respondent. Although its is within the limit of probability that these individuals, (and the individuals who appeared at V&T Catering Hall), were sent by the Employer to observe/spy on the voting process, I do not think that the evidence to support an "agency" theory is sufficient in this case).

(d) Events at the Roosevelt Hotel

This voting location is at 45th Street at Park Avenue in Manhattan. It is near Grand Central Station and is within walking distance of many of the Duane Reade stores and is easily accessible by subway or bus to most of the city including the outer boroughs, except for Staten Island. The election was held on the second floor. (It was moved from the ninth floor to the second floor).

The events at this location were not that much different than those at the other locations. Employees were escorted by Duane Reade managers to the hotel and in some cases they accompanied them up to the floor where the election was being held and waited outside in the hallway. Employees were given Vote No buttons by managers and asked to vote against the affiliation. A large sign was put up by the Company urging employees to vote against the affiliation. Substantial numbers of managers were stationed at the hotel during the entire day where they greeted voters as they arrived.

Michael Manning testified that at one point during the day, he overheard one manager tell another that he was required to send an e-mail that night or the next morning accounting for everybody in the store. Manning could not say exactly who these people were but he assumed

that they were store managers because they associated themselves with others who were on the Duane Reade side of the street. (In the morning, the police had separated the union people and the Duane Reade people on either side of the street, near the hotel's entrance.

4. The Outcome

The results of this election were that 951 people voted against the affiliation and 635 people voted in favor. There also were 428 challenged ballots that were never either resolved or counted.

5. The Second Affiliation Vote

On May 12, 2003, the ATC Executive Board held a special meeting and decided that the election should be set aside based on the Company's interference. The Executive Board minutes, which also contain a legal memorandum from the Union's attorney, relied, *inter alia*, on company surveillance, threats, interrogations and also on the misrepresentations concerning the ATC's alleged misuse of funds.

Accordingly, the ATC asked the AAA to run a second election at the end of May, 2003. This time, the election was arranged so that instead of a manual ballot, (to avoid company managers from escorting employees to the voting places), it was decided to have a system whereby the active employees would be given a pin number and a phone number to call and by which they could vote telephonically. Their votes would only be registered and counted if they called from their home phone numbers. Obviously, a key element in this procedure was that the employees had to be notified of the vote and the AAA had to know the employees' home phone numbers. Luckily, the Respondent had provided to the ATC, on May 5, 2003, a list of the last known names, addresses and phone numbers of the full- time employees in the ATC represented stores. General Counsel Exhibit 42 is a pamphlet mailed by the Union describing the election procedure and assuring employees that no one would know how they voted. Retirees were sent mail ballot votes.

Starting around May 13 or 14, representatives of ATC and Local 338 made efforts, and in some cases succeeded in visiting stores to talk to and leave information with the employees. In many other cases, store managers, upon discovering these union representatives talking to employees in a store, ordered them to leave and threatened to, or called the police when they refused.

If employees encountered difficulty in voting by phone, (perhaps because of a change in phone number), or if they did not receive a mailed voting instruction, they were instructed to call the AAA, whose representatives told them how they could vote. (In this regard, Rey Rosado testified that at most, 10 to 15 employees reported to him that they had some difficulty in voting and that he referred them to the AAA).

On May 17, Rizzo sent another memorandum to employees complaining about the fact that the Union was holding a second election and urging employees to vote against affiliation. Once again it is fairly obvious that the Company's goal in defeating the affiliation was to destroy ATC and to oust it as the employees' representative. The memorandum stated;

> FELLOW EMPLOYEES ARE GOING TO COURT TO PREVENT THIS OBVIOUS DISREGARD OF YOUR VOTE. Your vote belongs to you. We ask you to vote no or wait until the court decides if you have to vote at all. When and if the Court advises you to return the ballot, VOTE NO, CONTINUE TO SEND THE MESSAGE TO "THIS UNION" THAT YOU DO NOT WANT THEM AROUND ANYMORE. GET THIS OVER WITH AND LETS GET DOWN TO FINDING GOOD AND COMPETENT REPRESENTATION, IF YOU WISH AND IMPROVE EVERYTHING TOGETHER.

On May 29, 2003, Rizzo sent another memorandum to employees, which among other things, directed employees to report any communications they received from the unions to their supervisors and to refrain from responding without receiving management's approval. This memorandum stated:

> 1. On May 8, 2003, you have VOTED NO and denied the affiliation between Allied Trades Council and Local 338 …. Your message was clear to us and this is the vote that will be honored regardless of what anyone or any other organization tells you. We shall only honor the May 8, 2003 "NO AFFILIATION" decision.
>
> 2. On Wednesday, May 28, 2003, the New York Court issued a temporary restraining order that prohibits organizations, Local 338 and its Agents, from entering our stores and property and interfering with your work, disrupting our business or soliciting anyone. Any violation of this court order should be immediately reported to your supervisor.
>
> 3. You should direct all communications you receive from anyone on these topics to your immediate supervisor and not respond to any questions on this subject without first discussing it with your immediate supervisor.

On May 29, 2003, the AAA certified that there were 344 yes votes and 26 no votes. After this, ATC and Local 338 considered themselves bound by the vote and ATC was formerly incorporated as a division of Local 338.

In connection with this second election, the Company argues that it even if there were grounds for the Union to overturn the first election, the second election was held too quickly after the first and that the Union did not adequately communicate to the employees. In one of the more disingenuous arguments, the Respondent asserted that the Unions, (who at the same time were being denied access to the stores to communicate with employees), should have updated its mailing list and made a better effort to communicate with employees. But at the time of this second election, the Union relied on an updated list of names, addresses and telephone numbers that had been provided by the Company just days before the first election, after its repeated requests for such a list had been ignored. And in this respect, it is self evident that the Company would have been a better source of current names and addresses than the Union, which hadn't

had much contact with these employees for several years.

After the affiliation was affected, John Morro, Rey Rosado and Basil MacDonald, former ATC executive board members became, respectively the Director and Assistant Directors of what is now called ATC Division of Local 338. (At first they received their old salaries and benefits, but did get a subsequent raise.) Other former Executive Board members Jack Seibel and James Crowley did not transfer to the new organization. As officers of the ATC Division, Morro, Rosado and MacDonald continued to be responsible for representing the employees formerly represented by ATC in terms of contract enforcement, contract administration, etc. The former members of ATC did not pay any new initiation fee upon the affiliation and they continued to pay the same dues, albeit there will be a program to equalize dues over a three year period.

At some point in November 2003, ATC's treasury, (to the extent that there was any money left), was transferred to Local 338 to be used to provide services for former ATC represented employees. In this regard, it is evident that the purpose of the merger was not so much to add to Local 338's coffers, but so that Local 338's assets could be used to help the ATC Division continue to represent the Duane Reade employees and not go out of existence.

Although the Constitution of the United Food and Commercial Workers provides for a procedure whereby the International President *may* review and approve collective bargaining agreements, there is nothing in that document, or in the evidence taken in this case, that would impinge on the primary responsibility of the ATC Division to negotiate and conclude contracts with employers on behalf of the employees it had represented in the past or in the future.

6. Events after the Second vote

Subsequent to the second affiliation vote, John Morro, on August 22, sent a letter to Rizzo demanding an updated list of the names addresses and phone numbers of the employees in the 142 stores represented by ATC. On August 29, Rizzo acknowledge receipt of the letter but made no promises. On September 14, 2003, Morro sent another letter demanding the information requested on August 22. Two more follow up letters were sent by Morro on October 20 and December 12, 2003. (The last letter also demanded information concerning the names, addresses, current store locations and current job classifications for each employee including pharmacists.) The Company has not complied with these requests.

On or abut December 3, 2003, the Company's store managers distributed what purports to be a customer petition and asked store employees both to sign and solicit customers to sign it. This stated in part;

> I UNDERSTAND THAT DUANE READE EMPLOYEES VOTED OVERWHELMINGLY AGAINST AN AFFILIATION WITH LOCAL 338 ON MAY 8, 2003.
>
> I DO NOT SUPPORT LOCAL 338'S EFFORTS TO FORCE ITSELF ON DUANE READE EMPLOYEES.
>
> I BELIEVE THAT IF DUANE READE EMPLOYEES ARE

REPRESENTED BY A UNION THAT THEY DO NOT WANT
THAT IT WILL RESULT IN POOR CUSTOMER SERVICE

This petition, according to employee Charlotte Ballard played the principle role in her discharge. This will be discussed below.

The General Counsel also presented credible evidence that in addition to soliciting employees to ask customers to sign the petition, store manager Churchill Jack paid employee Rosa Lugo in the form of a $25 gift certificate for obtaining the most signatures.

Although there is evidence that the Company has continued to deal with ATC representatives regarding some employee grievances, the Company's position in this case is that the affiliation vote was flawed and that it has no obligation to recognize or bargain with the new entity. Thus, in the May 29 memorandum to employees, Rizzo stated; "We shall only honor the May 8, 2003, 'No Affiliation' decision."

7. The 8(a)(3) allegations

(a) Edward Cave

Edward Cave was employed as a stock person in a store located on Broadway near either the Astor or Bleeker Street subway stations. (As such, no more than 10 to 15 minutes away from the Roosevelt Hotel). Cave worked the late shift that started, depending on the schedule, either at 11:00 p.m. or midnight. Although he primarily was assigned to do stock work, he occasionally worked as a cashier when needed.

Cave testified that on the night of May 6, 2003, his supervisor Eddie Ibea asked him if he was aware of the vote and told him that it was important that he vote no in the election. Cave testified that he asked if he would get into trouble if he voted yes and was told by Ibea that he wouldn't. But Cave went on to testify that Ibea then said that the only thing that will happen is that you'll get transferred to a store far from where you live. (Ibea essentially admitted that he told this to employees). Cave states that Eddie also said that if three people out of each store voted yes, that everybody's job would be on the line.

According to Cave, after completion of his May 7/8 shift on Thursday morning, he was told by Charlotte to wait around so that the Company could bring him to the election. (Charlotte did not testify). Cave left and went home. He states that he received a call on his cell phone from store manager, Joshua Cox, at around 9:00 a.m. telling his that he would have to be back in the store by 11:00 a.m., so that a bus could pick him up and take him to the election. Cave testified that he asked Cox if he would be fired if he didn't come and states that Cox said yes.

Cave testified that he did not come into work on Friday, May 9 because he thought that he had been fired for refusing to come back to the store the previous day. Cave states that when he did go in on Saturday, he spoke to Eddie Ibea who told him that he had been suspended and that it had something to do with the vote. Ibea was not asked about this by Respondent's counsel and therefore did not deny it. I will assume that Counsel knew what he was doing.

According to Cave, he called Cox on Monday morning to ask how long he was suspended. He states that Cox asked him why he didn't come back to the store as he directed him to do on May 8. He states that Cox then said that Cave had an appointment to see Seymour Stein. Cave responded that the Company would hear from his union representative or the Labor Department.

Joshua Cox testified that he recommended Cave's discharge based on Eddie's recommendation and various warnings that had been issued to Cave. He also states that he based his recommendation on Eddie's reports that Cave was tardy. Cox denied that he told Cave to return to the store so that he could be driven to the election. He does concede, however, that he was instructed to accompany the employees to the polling place and understood that it was very important that as many of his employees as possible should vote in the election. Cox testified that he offered rides in a van to the employees and told the late night employees to wait around instead of going home, so that they could get a ride to the polling place.

Cave testified that he, along with union representative Rey Rosado, met with Stein on May 19, 2003. At this meeting, Cave testified that he was shown a group of warnings by Stein and that although he acknowledged some, he testified that there were others that he says were never shown to him before. Cave also states that the facts asserted in those "warnings" did not happen.

The documents that Stein gave to Rey Rosado, the Union representative at the meeting, were faxed to the NLRB's Regional Office by the Union. On several there is no statement to the effect that employee "refused to sign". On copies of the same documents turned over at this trial to the General Counsel pursuant to subpoena, these same copies state "refused to sign." The implication of the statement, "refused to sign" is that the affected employee was shown the documents at the time of the warning and refused to sign. But this is what Cave denies.

It looks to me like the Respondent, on May 19, 2003, may very well have manufactured a set of additional warnings to bolster its discharge case and then doctored those documents so that when they were produced at a trial, they would "prove" that Cave was given warnings that were never issued to him. Further, I do not credit the testimony of Stein to the effect that he decided to fire Cave because Cave was confrontational with him during the May 19 interview. In this regard, there was quite a difference between Stein's testimony when called by the General Counsel pursuant to 611(c) when he could only vaguely recall this meeting and his testimony when called by his own Counsel and where he testified that Cave used objectionable language, had an attitude and was confrontational and intimidating.

Based on the credited evidence of Cave, I conclude that store manager Cox was upset that Cave did not follow his instructions to return to the store on May 8 so that he could be escorted by management to the polling place. [12] In my opinion, Cox thereupon recommended that Cave be discharged. I also believe that the Company manufactured additional evidence to bolster its

[12] Section 7, among other things, gives employees the right to join, assist, or participate in union affairs. By the same token Section 7 gives employees to right to refrain from such activities. Since voting for a union affiliation would be classified as union activity, Cave had the concomitant right to refrain from so acting, and the company's interference with that right would be a violation of the Act.

reason for suspending and discharging him. Had Cave not failed to follow Cox's instructions regarding the election, I doubt that he would have been discharged for the infractions that he admitted to. As such, I conclude, consistent with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent violated Section 8(a)(1) and (3) of the Act. [13]

(b) Leo Sharples

Sharples worked at one of the downtown stores within walking distance of the Embassy Suites hotel.

I must say that Sharples' testimony about the events on May 6 was a bit confusing to me. As I understand it, Sharples learned on that morning that he was being transferred to another store. Sharples also testified that sometime during the same day he had a conversation with store manager Edwin Rivera, who read something to him and said that Sharples should vote. He states he told Rivera that he didn't intend to vote and that Rivera said that if he didn't vote against the affiliation, Sharples would be transferred to another far away store and would be forced to quit. According to Sharples, he told Rivera that he was being transferred and Rivera said that there was a lot more of that going to happen.

Rivera was called by the Respondent and testified that he never had any conversations with Sharples about the election because Sharples had already left the store before he spoke to any employees about the affiliation vote. (This is not particularly likely because Sharples was still at the store on May 6 and that was only 2 days before the election).

On May 6, Sharples met with Stein who told him that there was a store on Broadway and 96th street that needed an experienced stockman and that Sharples was going to be transferred there. Sharples states that he asked why he was being transferred and Stein volunteered that it had nothing to do with the Union. According to Sharples, he told Stein that he never mentioned a union.

At this interview, Stein, who had been given a copy of Sharples' personnel file, discovered that Sharples' authorization to work in the United States had expired some time ago. Stein asked about his immigration and work status and told Sharples that he needed to get a renewed authorization and could not work legally in the U.S. until this was accomplished. As a consequence, Sharples did not start to work at the new store.

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[13] In all of the discharge allegations, the Respondent asserted that Seymour Stein made the decisions and that only he could make the decisions. The implication is that even if the recommendations by supervisors were tainted by unlawful considerations, the actual discharges would not violate the Act because Stein lacked the necessary illegal motivation. In *Golden's Foundry & Machine Co*. 340 NLRB No. 140, (2003) the Board held that unlawful animus & motivation must be imputed to Human Resource manager Giddings, because were it not for the fact that the supervisor brought the employee's purported misconduct to Giddings' attention, he would not have been discharged. "Giddings' good-faith belief in what Toland falsely told her does not insulate the Respondent from the consequences of its action in discharging Jones in reliance thereon."

On May 8, 2003, Sharples went to the INS and got the forms that had to be filled out. He then went to see Stein and explained that he needed more time. Stein said he could have a week.

Ultimately, on July 3, 2003, Sharples got his new documents that allowed him to work in the United States and when he presented them to Stein, he was put back to work almost immediately at a store on 34th street in Manhattan. (This was a store that Sharples had worked at before.)

As in the case of Cave, Sharples credibly testified that he was told by his store manager, Rivera that he would be transferred to a far away store if he didn't vote against the affiliation. And although there was credible testimony by other General Counsel witnesses, (such as Cave), that transfers were not all that unusual, it is particularly suspect that Sharples was told that he was going to be transferred on the same day that he advised his supervisor that he didn't want to vote.

Frankly, I do not believe the company witnesses who testified as to the circumstances surrounding their decision to transfer Sharples and I would conclude that a motivation for his transfer was because he chose not to follow the Company's lead in having as many of its employees vote in the election and to have them vote against the affiliation.

As to the allegation that Sharples was illegally discharged, the evidence is quite clear that at the time, he was not legally entitled to work in the United States. However, had it not been for the illegal decision to transfer him, this fact would not have been known to Stein who discovered Sharples status at the interview concerning the transfer. Thus, although it would be perfectly legal for the Company to suspend or terminate Sharple's employment because of his work permit status with the INS, the motivation for that second action was tainted by the events leading up to the first.

Notwithstanding my conclusions that the Respondent violated Section 8(a)(3) by illegally transferring and then suspending Sharples, the Company immediately put him back to his former job, (albeit at another and closer location), once he received the necessary papers from the INS. Therefore, it is my opinion that reinstatement is not required in his case because he did in fact return to work without any loss of seniority. Also, it is my opinion that backpay cannot be awarded to him because during the time that he was not working, he was not legally entitled to work. *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 902-903 (1984).

(c) Consuelo Rodriguez

Consuelo Rodriguez was hired a stock person in July 2000. On her job application, she indicated that she was free to work at any time and did not state that there were religious reasons why she could not work on Saturdays or Sundays. (The Company asserts that if an applicant indicates that he or she can't work certain days for religious reasons, that will be indicated on the application and the Company will make every effort to accommodate an otherwise qualified person in terms of his or her work schedule).

At the time of her hire, Rodriguez was given some training to work the cash registers but she states that she couldn't do this. Rodriguez testified that she was told that she didn't have to work the cash registers and would work exclusively as a stock clerk. (GC 29 is a document that

the General Counsel claims is an agreement that she could work only as a cashier, although it doesn't say this).

Normally, non-pharmaceutical employees are hired either as cashiers or stockpersons, but are trained and expected to do both functions as needed. This was confirmed by the testimony of General Counsel witnesses, Cave and Sharples. In any event, Rodriguez testified that under the previous store manager, she was never assigned to work the cash registers. At the time she was fired, Rodriguez worked in the Bronx at a store on Westchester Avenue. Her store manager was Mohamed Mazid who had come in to replace the previous store manager.

Rodriguez' testimony regarding her conversations on May 7, 2003 with Mazid about the election has already been described above. So too has her testimony regarding her conversation with him on May 8 when she told Mazid that she had already voted and Mazid got upset and said, "you obviously voted without knowledge; pray that everything is okay."

According to Rodriguez, later on May 8, Mazid told her that he wanted her to work the cash register and also to work on Sunday. Rodriguez asserts that she told him that she could not work the cash register and that she couldn't work on Sunday because she was going to church and was going to take her granddaughter who was in from Philadelphia. As far as the cash register, Rodriguez testified that she has difficulty with numbers and gets headaches when she gets nervous. She states that Mazid told her that he would give her a couple of hours to think about working the cash register and that a short time later, he told her to punch out.

Rodriguez testified that ever since the election, Mazid has increased the number of hours that she worked and required her to stay until the store's closing time.

Rodriguez took a two-week vacation starting on July 21, 2003. When she returned on Sunday, August 3, she testified that there was a message on her answering machine stating that Mazid wanted her to report to work that Sunday. According to Rodriguez, she telephoned the store and told Mazid that it was too late for her to report to work and in any event, she never worked Sundays.

Rodriguez did not go to work on Monday, August 4 and on August 5, she was sent to a different store in the morning. August 6th was her day off.

According to Rodriguez, she was told to work on the cash register on May 7 and when she told Mazid that she couldn't, he gave her a written warning and told her to go home. She states that he told her to see Seymour Stein on Monday, August 11.

On August 11, Rodriguez, accompanied by union representative Basil MacDonald, went to see Stein. She testified that she explained that she didn't work on Sundays because she went to church and that Stein said to forget about working Sundays. Rodriguez testified that she also explained that she couldn't do the cash register because she was hired as a stock clerk and got migraine headaches that came on because she got stressed as she was not good with numbers. She and MacDonald testified that Stein said that if she couldn't operate the cash register, he couldn't use her. They state that when MacDonald asked if she could be trained to use the register, Stein said he couldn't take the chance. At the conclusion of this interview, Rodriguez was told that her employment was terminated.

The Company asserts that the reason that Rodriguez was fired was not only because she failed to show up on Sunday, August 3 and refused to work the cash register on May 7, 2003, but because, in the past, she had refused to work on other Sundays, that she had refused to work the cash register on other occasions and that she had refused to do certain work that stock people ordinarily do, such as unload deliveries. The Company claims that it had no documentation from her that she could not work Sundays for religious reasons and that its standard practice is to require stock people to work the cash registers when needed. To the extent that Rodriguez may have been able to avoid working the cash registers in the past, the Company asserts that Mazid was a new store manager who was put there to tighten up the ship, which had previously been loosely maintained.

As in the case of Edward Cave, Rodriguez denied receiving many of the written warnings that allegedly were given to her during the course of her employment. And because I have substantial doubts about the Cave warnings, I am not much inclined to rely on the warnings that the Company presented to justify Rodriguez's termination except to the extent that she admits their receipt.

On the other hand, the timing of her discharge is not connected to any event that is significant in relation to union activity. Other than the fact that she went to vote on her own, (on May 8), Rodriguez did not openly display any sympathy or antipathy to the unions or to the affiliation vote.

In my opinion, the difference in her case from that of Cave's, is one of timing. I have concluded that Cave's store manager became angry when Cave passed on being escorted to the polling place, and that the decision to fire him occurred immediately after the fact. In Rodriguez's case, her decision to pass on being escorted to the vote occurred about four months before her discharge.

Nevertheless, it seems to me that given all of the other evidence in this case showing anti-union animus and evidence in Rodriguez's situation that supervisor Mazid began to increase her workload soon after she refused to be escorted to the polling place, it seems to me the General Counsel has made out a primae facie showing that a reason for her discharge was due to her protected activity. As I am not convinced by the Company's stated assertions for its reasons for discharging her, (including my suspicion regarding the alleged prior warnings), it is my opinion that the Respondent has not met its burden of showing that it would have terminated Rodriguez's employment in any event for nondiscriminatory reasons.

(d) Collette Ballard

On September 25, 2003, Collette Ballard began her employment as a part-time casher at a store on 57th street and 3rd Avenue. The store manager was Churchill Jack.

On or about December 3, 2003, the Company had its store managers circulate a petition that customers were urged to sign as an expression of opposition to the affiliated union. This apparently was done to counter some petitions that the Union gathered and intended to present to some politicians at a rally to be held on or about December 4.

According to Ballard, on December 3, 2003, the assistant store manager, Omar Nicholson showed her the petition and asked her to sign it. She testified that she didn't want to sign it or

have anything to do with it. At that point, according to Ballard, Nicholson put the petitions on the top of her drawer and said that she had to get some customers to sign it.

Ballard testified that at around 3:00 p.m. she came back to the store after her lunch break and saw Nicholson writing down names on the petition. She states that she asked him why this was so important and Nicholson said that the bosses in the main office told him to get a certain number of signatures. Ballard states that she then noticed that her name was on the petition and asked him why he signed her name after she had made it clear that she was not going to sign. She states that Nicholson asked her if she was mad, and she told him that she was. According to Ballard, Nicholson stated; "who the fuck cares," whereupon she told him not to curse at her. She testified that he said; "you know what, go home and leave you're ID."

Ballard testified that on December 4, she called store manager Churchill Jack and asked if she had been fired. She states that he told her that he had to talk to Omar Nicholson and would get back to her. Ballard states that when she called later in the day, Jack said he was busy and that he would call her back. According to Ballard, on the following day, she again called and Jack said that he had a lot of paper work to do and would call her back in 15 minutes. Ballard testified that when neither Jack, nor anyone else in the Company called her back, she contacted Rey Rosado who suggested that she go to the Labor Board and file a charge. This is what she did.

The Company claims that Ballard was laid off due to the fact that this store was over budget. It also asserts that although there were other employees who were less senior than she, she was a part-time employee who had to be let go first. (The evidence shows that there were four people hired after Ballard was hired including a cashier who was hired 2 weeks before December 4. I also note that to some extent these stores are seasonal and sell a lot of merchandise right before Christmas. As Rodriguez was fired or laid off during the Christmas selling season, this tends to undercut the Company's argument that the decision to let her go was for purely economic reasons.

The act of Ballard in refusing to sign the "customer" petition and her complaint about having her signature forged is activity, which, in my opinion, is protected by the Act. This petition, even though ostensibly directed toward customers, constituted illegal interrogation when employees were asked to sign it. Moreover, the petition was part of a broader campaign by the Company to defeat the affiliation vote and ultimately to eliminate ATC as its employees' bargaining representative. As I conclude that the General Counsel, via the credible testimony of Ballard has shown that the Company discharged her for refusing to sign this petition, I conclude that it violated Section 8(a)(1) & (3) of the Act. [14]

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[14] The General Counsel argued that there were discrepancies between Respondents' evidence given at the trial and statements made by Respondent's Counsel in a position letter sent to the Regional Director. This document was received with qualifications because there was a question as to whether it would be privileged as an attorney's work product. In *Kaiser Aluminum & Chemical Corp.*, 339 NLRB No. 100 (2003), the Board held that a Charging Party's position statement constituted attorney work product within the meaning of Rule 26(b)(3) of the Federal Rules of Civil Procedure, and reversed an Administrative Law Judge's ruling that the Charging Party's petition to revoke Respondent's subpoena *duces tecum* that sought production of the position statement. The General Counsel argues that *Kaiser*

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III. Analysis

I have already pointed out that the Company's effort to thwart ATC's efforts to affiliate with Local 338 was, in reality, an effort to rid itself of any union representation at the stores in question. This is because as a result of the Company's failure to make dues contributions to ATC since 2001 and the concomitant inability of that Union to collect dues voluntarily from most of its members, (who were employees of Duane Reade), ATC, as of 2003, was on the road to extinction. It's only hope of a continued existence was to affiliate itself with a union that had greater assets.

And so the Company embarked on an extensive, expensive and coordinated effort to convince its employees, who made up more than 95% of ATC's membership, to vote against affiliation. The question here is whether the actions it took were exercises of "free speech" as defined in Section 8(c) of the Act or were acts which consisted of unlawful interrogations, threats of reprisal, promises of benefit, intimidating surveillance, and illegal discharges or other adverse actions against employees.

The next questions involve the elections and the consequences thereof. Having lost the first affiliation vote, did ATC have sufficient grounds for invalidating that election and holding a new election by telephone vote? And if the second vote was in favor of affiliation, was the Company obligated to recognize and bargain with the new entity, now called ATC Division of Local 338.

To the extent that I have made and discussed certain conclusions in the previous sections of this Decision, I shall not repeat that analysis. On the other hand, certain other allegations require a bit more discussion and I will endeavor to do this here.

In conjunction with the April 14, 2003 e-mailed message that store managers distributed to employees, Patricia Thompson credibly testified that supervisor Muhammed Dessouki told her that she had to read and understand this message or she would be fired. This constitutes a threat of discharge in violation of Section 8(a) (1) of the Act.

Patricia Thompson credibly testified that in early May 2003, the Respondent by its assistant managers at her store, solicited employees to sign a petition stating that they no longer

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does not control inasmuch as the Respondent in its position letter made no assertion of privilege. They contend that statements by Respondent's counsel constitute admissions, (and therefore are not defined as hearsay) and that they are relevant. They note that attorney position statements have consistently been held to be admissible by the Board. See, for example, *McKenzie Engineering Co.***,** 326 NLRB No. 50, JD opinion at 13 fn. 6 (1998); *Hogan Masonry,* 314 NLRB 332, 333 JD fn. 1 (1994); *Optica Lee Borinquen,* 307 NLRB 705 fn. 6 (1992); *Massillon Community Hospital,* 282 NLRB 675 fn. 5 (1987); *American Postal Workers Union,* 266 NLRB 317, 319 fn. 4 (1983). Indeed, a position letter attached to an unsuccessful) motion to dismiss the complaint was considered and weighed in *United Technologies Corp.***,** 310 NLRB 1126, 1127 fn. 1 (1993).

As it is my opinion that the Respondent's position statement would be, at most, peripheral to this case, I have not read it and therefore have not considered it in making my decision. Therefore, I will leave it to the Board to sort out its position regarding the admissibility of attorney position statements.

wished to be represented by ATC. This constitutes a form of illegal interrogation outlawed by Section 8(a)(1) of the Act. *Armored Transport Inc.*, 339 NLRB No. 50, pgs 4-5 (2003); *Loudon Steel Co.*, 340 NLRB No. 40 (2003).

The evidence establishes that prior to the first affiliation vote, company supervisors and managers, at the stores and while accompanying employees to the polling areas asked and in some cases *directed* employees to wear Vote No buttons. The credible evidence is that in many instances the Company's store managers went far beyond simply making these buttons available to employees at the stores. As the evidence shows that managers actively solicited and/or directed employees to wear these buttons, this conduct constitutes a form of illegal interrogation and violates Section 8(a)(1) of the Act. *Kurz-Kasch*, 239 NLRB 1044 (1978); *Allegheny Ludlum Corp.*, 333 NLRB at 739; [15] *New Era Cap Co.*, 336 NLRB at 534-535. Cf. *Barton Nelson Inc.*, 318 NLRB 712 (1995) where the Board held that a company did not violate the Act where, in the absence of other coercive conduct, it merely made such paraphernalia available to employees.

By the same rationale, I conclude that the Respondent violated Section 8(a)(1) of the Act when on December 3, 2003, (well after the elections), the Respondent solicited employees to sign a petition which although directed to customers, would indicate that the signor was opposed to the affiliation.

Leelavathi Rampersaud credibly testified that on or about May 3, 2003, store manager, Farhaad Jacob interrogated her as to whether she wanted ATC to represent her. When she said yes, he told her that she should not speak to any of the employees about that union. Rampersaud further testified that on May 5, 2003, Jacob again asked her how she was going to vote because he had to send a list of names into the office as they needed to know who was going to vote yes and who was going to vote no. She also testified that on May 8, 2003, as Jacob accompanied the employees to the polling place, he told them to make sure that they wore the Vote No buttons and to make sure that they voted against the affiliation. She credibly testified that he said that the Company would find out how the employees voted and that if they voted for the affiliation, he would have no choice but to transfer them. The testimony of Rampersaud, which I credit, shows that the Respondent **(a)** illegally interrogated employees about their union activities; **(b)** threatened employees with transfer if they voted, against the Company's wishes, in favor of the affiliation; **(c)** gave the impression that the Company was going to surveil how the employees voted;[16] and **(d)** illegally interfered with Section 7 rights by directing her not to talk to other employees about the union affiliation vote.

Consuelo Rodriguez, also found to be a credible witness, testified that on May 7, 2003, store manager, Mohammed Mazid interrogated her as to how she was going to vote. When she

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[15] In *Allegheny Ludlum*, the issue was the Company's requests that employees appear in an anti-union video. In discussing that issue, the Board also discussed solicitations to wear or display various other anti-union paraphernalia.

[16] In *Feldkamp Enterprises, Inc.*, 323 NLRB 1193, 1198 (1997) the Board held that an employer created the impression of surveillance by telling employees that it would know how they voted. See also *Genesse Family Restaurant*, 322 NLRB 219, 223-224 (1996), enf'd, 129 F.3d 1264 (6th Cir. 1997).

told him that she thought it was supposed to be private, he said, “no, no, you can tell me.” In conjunction with other acts of interrogation, I conclude that the Respondent violated Section 8(a)(1) of the Act.

Helen Egan credibly testified that on May 7, 2003, District Manager Ryan Moore promised employees that if they voted against affiliation they would have their hours restored and that they would receive merit raises but that if they didn’t vote against the affiliation, they would not get their raises or their hours restored. I conclude that these statements violate Section 8(a)(1) of the Act inasmuch as they constitute promises of benefits and threats to withhold benefits.

Lizzelle Morris credibly testified that during the week before the election store manager Mamadou Terra and assistant manager Aisha Kahn, on several occasions, asked her how she was going to vote and told her to vote no. Morris added that Terra told her that the Union was bad for the Company and that if the employees voted “yes” a lot of jobs would be lost. Morris credibly testified that on May 7, 2003, Devindra Sanger, came to speak to the employees in the store and said; "If you guys vote yes for the merger, by the next day you're not going to have any medical benefits, no benefits whatsoever, because Duane Reade don't have to provide you with benefits. They doing you a favor." Morris also testified that on May 8, Terra asked her if she was going to vote and that when she responded that she would do so on her own time, Terra stated that the district managers had a list of people who were going to vote and that when she arrived at the polling place, they were going to scratch off her name. I conclude that by these statements, the Respondent violated Section 8(a)(1) of the Act by **(a)** coercively interrogating employees, **(b)** threatening employees with the loss of jobs and benefits if they voted in favor of the affiliation and **(c)** giving employees the impression that their voting would be surveilled.

Patricia Thompson credibly testified that supervisors Dussouki and Geronimo told her that she should know how to vote if she wanted to keep her job and that if employees didn’t vote no, they could lose their jobs or be transferred to a store far away from where they lived. According to Thompson, on May 7, Dussouki told her and other employees that they were lucky to have jobs and that they should vote no to keep their jobs. These comments by company supervisors constitute threats of transfer and discharge and violate Section 8(a)(1) of the Act.

Leo Sharples credibly testified that on May 6, store manager Edwin Rivera told him and other employees that if they didn’t vote against the affiliation, they would be transferred to a distant store and would be forced to quit. This constitutes an illegal threat in violation of Section 8(a)(1) of the Act.

Edward Cave testified that on May 6, 2003, night manager Eddie Ibea told him that it was important for him to vote and when he asked if employees would get into trouble if they voted in favor of the affiliation, Ibea said that if they voted yes, they would get transferred to a store far away from their homes. Cave also testified that Ibea told him that if employees voted yes, “everybody’s job would be on the line.” Ibea admitted that he told employees that if they didn’t vote the way the Company wanted they would be transferred to other stores. Cave further testified that on the morning of May 8, 2003, after he had gone home from the night shift, he received a phone call from store manager Cox who told him that he had to come back to the store because a bus would come to pick up the employees and take them to vote. Cave credibly testified that when he asked Cox if he would be fired if he didn’t return, Cox said yes and that

Cave would see what happened if he didn't return to the store. These statements by Cox and Ibea constitute threats of transfer and discharge if Cave didn't come in to vote and vote against the affiliation. They therefore are violations of Section 8(a)(1) of the Act.

Yvette Daniels credibly testified that on the morning of May 8, 2003, store manager Churchill Jack spoke to employees and told them that he had to accompany them to the vote and that the employees should vote against the affiliation. She further testified that he said that management would be in the room and would find out how they voted; that if they voted against affiliation they could get a raise, but if they voted for affiliation, they would be transferred or discharged. These statements by Churchill Jack are violations of Section 8(a)(1) of the Act as they constitute threats of reprisal and also give the impression that the employees' votes would be subject to surveillance.

The evidence shows that prior to the first election, the Respondent prohibited union representatives from coming into the stores and talking to employees either about the affiliation election or anything else. Moreover, employees were notified that they would be subject to termination if they talked to union representatives on working time.

The last contract between ACT and the Employer had a visitation clause, which on its face, allowed union representatives to visit employees at the stores at any time and for any union reason. The contract provision did not limit union representatives to any particular time, did not require prior notification and/or permission by management, and did not restrict such visits only to grievance matters. Whether or not one might read into this unambiguous clause a limitation of reasonableness, there is no evidence to suggest that the Company, when faced with these visits in April and May 2003, (most of which were related to the legitimate union business of whether to affiliate with another labor organization), made any effort to contact representatives of ACT so as to facilitate appropriate times to visits to the stores. Instead, the Company merely told these people that they should get out and when met with some resistance, threatened to call the police.

The law is clear that even after the expiration of a collective bargaining agreement, an Employer, (and a union), must continue, with the exception of union security and checkoff clauses, the existing terms and conditions of employment, (as represented by the terms of the collective bargaining agreement), until such time as the parties reach an impasse in bargaining, reach a new agreement modifying those terms, or until the Employer is legally discharged from its obligation to bargain with the Union. *W. A. Krueger Co*., 299 NLRB 914, 915 (1990); *Roman Iron Works* 292 NLRB 1292, 1293 (1989). In this regard, the Board has held that the access provisions of a collective bargaining agreement continue in effect after the expiration date of the contract. *Scott Brothers Dairy*, 332 NLRB 1542, n.2 (2000); *Control Services Inc*. 303 NLRB 481, 490, (1991).

In the prior decision by Judge MacDonald, 324 NLRB No. 105 she concluded that during the negotiations in 2001 where the Company, among other things, proposed to change the access provisions of the then extant contract, the parties had failed to reach an impasse and that Duane Reade had unilaterally and unlawfully implemented a last offer which included the access changes. As I have no reason to doubt that Judge MacDonald's decision will not be upheld on appeal, I conclude that the Respondent, in the present case, has violated Section 8(a)(1) and (5) of the Act, by refusing to comply with the clear and unambiguous terms of the expired contract's access provisions.

For the reasons stated in the previous sections of this Decision I have concluded in accordance with the principles set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent violated Section 8(a)(3) of the Act by discriminatorily discharging employees Edward Cave, Leo Sharples, Consuelo Rodriguez and Collette Ballard. As noted previously, I have also concluded that in the case of Sharples that no backpay or reinstatement is due to him because at the time of his separation, he was not legally entitled to work in the United States and that when his status was corrected, the Company immediately returned him to work without any loss of seniority. [17]

I reject the Respondent's argument that the Board should defer any of the 8(a)(3) cases to arbitration. While it is true that the Respondent has continued to arbitrate some disputes, there is no evidence that the Respondent at any time offered to arbitrate any of the discharges at issue in this case. In its Brief, the Respondent cites *Collyer Insulated Wire*, 192 NLRB 837 (837 (1971), but mistakenly seems to assume that the case holds that where an unfair labor practice charge is filed, it must be deferred if the Union did *not* request arbitration.

Moreover, the Respondent takes the position that it has no obligation to bargain with the newly merged union. As there has been a merger that has resulted in ACT being dissolved as a separate labor organization, there would be no union with whom to arbitrate with assuming that the Respondent is correct in its legal analysis. That is, the legal position of the Respondent is that it does not recognize any bargaining relationship with the present union. And since the old union no longer exists, the Respondent could later assert that there is no entity with whom to arbitrate any disputes.

Finally, the alleged illegal discharges here are part and parcel of a larger pattern of illegal conduct and deferral would require that various substantial allegations in these complaints be outsourced to folks outside the Board.

Now let us talk about surveillance.

In the present case, the evidence shows that on May 8, 2003, the Employer made arrangements for its managers to accompany its employees, either on foot or by vehicle, to the polling places. While doing so, the employees were urged by managers to vote against the affiliation and were either directed to or asked to wear Vote No buttons.

The Company's asserted reasons for making these arrangements was, in my opinion, completely false. It is quite clear to me that with perhaps a couple of exceptions, there was no reason for the Company to arrange for transportation for its employees as the voting places and

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[17] In my previous discussion, I have set forth what I consider to be the most material pieces of evidence presented by both sides. That said, I note that the General Counsel and the Respondent presented a great deal more evidence largely in the form of documentary evidence to buttress their respective positions on the 8(a)(3) allegations. Thus, for example, the General Counsel offered documents from the personnel files of other employees in an effort to show disparate treatment. The Respondent on the other hand, presented documents either purporting to show past disciplinary actions against the employees in question, or other documents showing that they were treated in a consistent manner with other employees. I have considered all of this evidence, having spent many hours between hearing dates in reviewing the documents offered.

the voting times were arranged so that employees could easily go and vote without any disruption of the Company's business. Contrary to the Respondent's assertions, it is my opinion that this was done so that the Company could create a kind of "group psychology effect" and so that the employees would feel that their votes were not private.

When employees arrived at the respective voting places, they were, in many instances escorted into the hotels, and in some cases up to the voting rooms. There was credible testimony that in some instances this was done in a manner so that employees would be discouraged from talking to or receiving written communication from union agents. That is, there was credible evidence to show that in some instances, when employees were disembarked from vehicles, company managers physically surrounded them and escorted them in such a manner to block union representatives from approaching the employees.

The Company claims it was justified in having so many of its managers present at the voting places and in escorting employees into the premises because it feared that the Unions' representatives would interfere with or prevent employees from voting. This claim was not backed up by any credible evidence and the assertion borders on absurdity. Why would the Unions seek to interfere with employees' voting when they had spent so much time and money in encouraging the employees to vote?

At each of the voting location the Company stationed managers and supervisors outside the hotels and in some cases, these people went right up to and stationed themselves right outside the rooms where the voting was taking place. [18] The company made its presence felt, not merely by escorting the employees to and from the voting areas, but by posting large banners proclaiming the Company's desire for the employees to vote against the affiliation.

For as long as I can remember, (and earlier), the Board has considered surveillance of employees' union and concerted activities to be a violation of Section 8(a)(1) of the Act. This is not merely because of a not inconsiderable concern for employees' privacy, but because the Board has concluded that this type of activity has an inherently intimidating effect. Thus, in the case of an employer videotaping employees engaged in concerted activity, (a subset of surveillance activity), the Board stated:

> As the judge recognized, the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco, Inc*., 273 NLRB 746, 747 (1984)…. Here the record provides no basis for the Respondent reasonably to have anticipated misconduct by those hand-billing, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that "something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that

[18] As indicated before, I do not think that the evidence is sufficient to establish that people who were company agents went inside the voting rooms.

> conduct to interfere with employees' right to engage in concerted activity."

In *Waco, Inc*., supra, the Board, in relation to an allegation that the Employer engaged in surveillance by photographing picketers, stated:

> It has long been held that "[i]n the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate." Photographing lawful, peaceful picketing tends to implant fear of future reprisals. In the particular circumstances of this case, we are convinced that the Respondent's conduct reasonably tended to restrain the employees from engaging in what was undisputedly protected concerted activity. The Respondent had no reasonable basis for anticipating picket line misconduct, since, both on the day of the lunchroom protesters' discharge and at all times during this picketing, the employees were orderly and peaceful. Such photographing by their former supervisor reasonably tended to coerce and restrain the picketers by "creating a fear among them that the record of their concerted activities might be used for some future reprisals," e.g., a refusal to consider them for rehire or a possible "blackball" of them with other employers. Unlike the situation in *U.S. Steel*, the picketers did not seek their own media coverage nor did the Respondent have a history of photographing picketing unaccompanied by employee reprisals. Photographing the picketing employees could reasonably tend to coerce them not to take further protected concerted action to voice their grievances concerning events at the Respondent's plant. Accordingly, we find that, by photographing the picketers, the Respondent violated Section 8(a)(1) of the Act.

Could there be any question that if a Company would violate the Act, if having found out that a union was having an organizational meeting at a neighborhood restaurant, instructed its managers to go to and wait outside while employees arrived and departed from the meeting? Would there be any conceivable argument that an employer would not violate the Act if it sent its managers to observe which employees went to a union's office to vote on the union's officers or vote on who would be the local shop steward?

There are, of course, exceptions. For example, if a union and employees engage in open activities, (such as hand billing or picketing), on the premises of an employer, the latter would be within its rights in observing the union's trespassing activities. *Hoschton Garment* 279 NLRB 565, (1986). And if the activities engaged in by employees and their union consisted of conduct that might be unlawful, (such as blocking entrances), there would be no prohibition on the employer's photographing such activity as a means of obtaining evidence. For example, in *Roadway Express* 271 NLRB 1238, the Board held that the employer did not engage in unlawful surveillance when it photographed strikers in order to gather evidence in support of its claim that they were engaged in a breach of the no-strike clause of contract. See also *Karatjas, Ordman's Park & Shop*, 292 NLRB 953, 956 (1989) where the Board held that there was no unlawful

surveillance when the employer photographed non-employee Union representatives who were picketing and where the purpose was to use the photographs as evidence of trespass.

In Board conducted representation elections, both sides have a right to be present outside of the polling places. However, the Employer cannot have its supervisors within the polling area or in any designated no-electioneering zone near the polling place. See Section 11326 of the Board's representation case manual. (An employer is entitled to select a non-supervisory employee to act as its observer during the election). But this is, in a sense, a necessary exception to the law that otherwise prohibits an employer from engaging in surveillance of its employees' union activities. The reason for this is that as the employer is a *party* to the election and as representation elections are normally held on the employer's premises, its representatives should have, except as noted above, the right to be present nearby the polling place and to electioneer to the same extent that is allowed to a Union, when employees approach the polls. For a discussion of electioneering near the voting area, see *Milchem, Inc*., 170 NLRB 362 (1968); *Rheem Mfg. Co*., 309 NLRB 459 (1992); *Yukon Mfg. Co*., 310 NLRB 324 (1993); and *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995).

But a union affiliation or merger vote is essentially an internal union affair to which the Employer is not a party. *Sullivan Bros. Printers*, 317 NLRB 561 (1995). Also, the election was held away from the Employer's premises. Further, as the May 8 election was set up so that employees had adequate time to reach the polls without missing their work, there was no necessity for the Employer to have its managers take employees to the polls and wait and watch them outside the polling areas before escorting the employees back to their places of work.

The Respondent contends that although it was not a direct party to the affiliation vote, the Board had held that it has a legitimate interest in expressing its views for or against affiliation. The Respondent cites *New Era Cap Co*., 336 NLRB 526 (2001), where the Board implied that at least in some circumstances, an employer could have a sufficient interest in urging its employees to vote one way or the other and that it could take certain actions in support of that position, to the same extent that it could in a Board representation election. Specifically, at issue was a contention that the employer offered transportation to employees to vote and reimbursement for a portion of their wages. The majority opined that as this was offered to all employees and not conditioned on the way they were going to vote, the conduct did not violate Section 8(a)(1) of the Act. In reaching this conclusion, the majority stated:

> We do not agree that employer conduct that would be privileged in the context of a representation campaign would be rendered unlawful in the context of an affiliation campaign. In both cases, the employees are exercising a Section 7 right. In both cases, the employer cannot interfere with, restrain or coerce the exercise of that right. Short of that, there is nothing to prohibit the employer from taking a position and/or encouraging employees to vote.

In my opinion, the difference between the conduct in *New Era Corp*. and the conduct in the present case is of such a different degree as to be of a different kind. Offering transportation and reimbursement of lost wages to all employees so that they can vote in a merger election is conduct that merely facilitates the voting itself, and cannot be said to be coercive. On the other hand, mass surveillance of the polling areas and surveillance of employees as they go to and

from the voting areas, is to my mind, inherently coercive and designed not to facilitate the voting, but to insure that the voting goes that way the Employer desires. And as I have concluded that the Employer's interest in this vote was, in reality, to destroy ACT so that its employees would be unrepresented, this is hardly the legitimate interest that the Board must have been contemplating in *New Era Cap*.

In light of my conclusions that the Respondent violated Sections 8(a)(1) of the Act by a wide variety of actions designed to intimidate its employees in relation to the May 8 affiliation vote, it is also my conclusion that ACT was well within its rights in declaring the results of that election a nullity and in making arrangements to run a second election. Moreover, as the Respondent's conduct at and near the polls was coercive, the Union's decision to run the second election by a combination of mail ballot and a telephone call in procedure was not unreasonable.

As noted above, the second election resulted in a vote in favor of affiliation. And while the number of people voting in the second election was much smaller, (not surprising in view of the Company's conduct), I cannot say that this vote was an unrepresentative showing. [19]

In my opinion, the unions had ample grounds for setting aside the first election. I further conclude that the employees were given adequate notice of the second election, which resulted in a valid vote in favor of affiliation. As I have also concluded that there is substantial continuity between ACT and the new entity, Allied Trades Council, a Division of Local 338, RWDSU/UFCW, AFL-CIO, it is my conclusion that the Employer was thereafter required to recognize and bargain with the new entity. *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986); *Sullivan Bros. Printers*, 317 NLRB 561, 562, (1995); *Mike Basil Chevrolet, Inc*. 331 NLRB 1044 (2000); [20] *Paragon Paint & Varnish Corporation*, 317 NLRB 747, (1995); [21] *Santa Barbara Humane Society*, 302 NLRB 833, 836 (1991); *Hammond Publishing*, 286 NLRB 49, 51(1986). Cf. *Lord Jim's*, 259 NLRB 1162 (1982) and *State Bank of India*, 262 NLRB 1108 (1982) where the Board held that the unions did not meet a minimum

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[19] See *Lemco Construction*, 283 NLRB 459 (1987) and *Glass Depot*, 318 NLRB 766 (1995), for the proposition that unless caused by an extraordinary event, the Board will not set aside a Board representation election where it is contended that a representative complement has not voted. Although a union is not bound by the Board's rules when it conducts an internal union election, the rationale of *Lemco* is appropriate. In *Lemco* the Board stated: "[t]here must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings." In political elections, voters who absent themselves from the polls are presumed to assent to the will of the majority of those voting. Similarly, when a Board election is met with indifference, it must be assumed that the majority of the eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an "adequate opportunity to participate in the balloting" will the Board decline to issue a certification and direct a second election."

[20] I note that in *Mike Basil Chevrolet*, the Board held that a union's failure to follow its own constitutional procedures is an insufficient basis for rejecting an affiliation election. See also *CPS Chemical Company Inc*., 324 NLRB 1018, 1020 (1997).

[21] In *Paragon Paint*, the Board held that minimal due process, although requiring a vote, did not require that the vote be by secret ballot.

standard of due process, either because a significant number of people were not given the opportunity to vote or because the vote notices were inadequate.

The evidence shows that after the second affiliation vote, the new entity, (herein called ATC Division), made a number of requests that Duane Reade provide the names, addresses and telephone numbers of the employees in the bargaining unit. These requests were ignored.

Pursuant to Section 8(a)(5) of the Act, information of this type is presumptively relevant. Accordingly, an employer with a valid bargaining relationship is required to furnish this information. In *Howe K. Sipes Co*., 319 NLRB 30, 39 (1995), the Board stated that such information is relevant because "[t]he Union's obligation to represent employees presupposes the ability to communicate with them." See also *Maple View Manor*, 320 NLRB 1149 (1996); *Burkart Foam*, 283 NLRB 351 (1987) enfd. 848 F.2d 825 (7th Cir. 1988); *Tom's Ford*, 253 NLRB 888, 894-895 (1980).

The General Counsel demonstrated that after the first election, representatives of ACT and Local 338 made attempts to visit employees in the stores in order to give them information about the upcoming second election. As in situations before the May 8 election, the Company refused to allow these representatives to enter the stores.

In the case of Local 338 representatives, (as opposed to ACT representatives), that union, not yet having achieved any kind of representative status *vis à vis* the Respondent, they would have simply been trespassers to whom the Company could legally refuse entry.

But after the second affiliation vote, when ACT became a division of Local 338, the new organization became the successor to ACT and thereby acquired the bargaining status of the former union. Therefore, it acquired the same right to require bargaining before any unilateral changes were made by the Respondent in the existing terms and conditions of employment. As such, when the Company refused to allow access to representatives of ACT Division, after the affiliation had been accomplished, it violated Section 8(a)(1) and (5) of the Act.

As I have concluded that the affiliation was valid, ACT Division succeeded to the bargaining rights of ACT and therefore was entitled to ask for and receive the names, addresses and telephone numbers of bargaining unit employees. Because the Respondent refused to furnish this information, I conclude that it violated Section 8(a)(1) & (5) of the Act.

It is further concluded that the unfair labor practices found above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

Except to the extent that I have found that certain actions of the Respondent were violations of the Act, I have concluded that the other allegations of the Complaint are without merit and should be dismissed.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged, Edward Cave, Consuelo Rodriguez and Collette Ballard, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge to the date of their reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977). [22]

The General Counsel contends that a broad order is warranted in view of the past violations found against the Respondent and in light of the extensive violations herein. I agree. *Hickmott Foods*, 242 NLRB 1357 (1979).

The Charging Party argues that in addition to the normal remedies, the Board should grant a remedy requiring the Respondent to reimburse the Union for the expenses of the May 8 election.

I have concluded that the Respondent engaged in substantial illegal acts by which it interfered with and coerced employees in relation to an internal union election. These acts included interrogations, promises of benefits, threats of discharge and reprisal, and massive surveillance. Having interfered with the May 8 election, this required the Union to set it aside and run a new election later in the month.

I think that the Charging Party is correct that the Respondent, having interfered with an internal union election should, as a matter of equity, reimburse the Union for those expenses that it otherwise would not have incurred but for the unlawful interference. In this regard, I think that such a remedy is analogous to those cases where the Board has required a Respondent to pay for negotiation and related expenses when it has engaged in flagrant bad faith bargaining. *Alwin Manufacturing Company Inc*., 326 NLRB 646 (1998); *Unbelievable Inc*., 118 F.3d 795 (D.C. Cir. 1997).

The fact that the General Counsel is not seeking this remedy does not bar the Charging Party from asking for it. The Charging Party is not attempting to alter or amend the allegations of the Complaint. It merely is seeking a different remedy for those violations found. *Kaumagraph Corp*., 313 NLRB 82 (1994).

But I think it would not be appropriate to require the Respondent to reimburse the Union for the cost of the first election because that cost would have been incurred with or without the unlawful interference. On the other hand, had it not been for the Respondent's interference, the Union would not have had to incur the costs of the second election. And therefore, I shall recommend that the Respondent reimburse the Union, with interest, for all costs relating to the holding of the second election.

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[22] As noted above, I have declined to require the Respondent to make whole or give reinstatement to Leo Sharples because at the time of his separation he was no longer legally entitled to work in the United States. Moreover, when he achieved the necessary certification and presented it to the Company, it reinstated him immediately without any loss of seniority.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [23]

ORDER

The Respondent, Duane Reade Inc., its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Suspending, transferring, discharging or otherwise retaliating against employees because of their union activities or because of their desire to refrain from engaging in union activities.

(b) Interrogating employees about their union activities and how they intended to vote in a union affiliation vote.

(c) Threatening employees with discharge, transfer, loss of benefits, or other reprisals unless they voted against the union affiliation vote.

(d) Promising benefits to employees if they voted against the union affiliation vote.

(e) Soliciting employees to sign petitions to decertify Allied Trades Council or to sign petitions that would evince their non-support for the affiliation between Allied Trades Council and Local 338.

(f) Refusing to allow representatives of Allied Trades Council or Local 338 to visit with employees in the stores.

(g) Threatening employees with discharge if they spoke to union representatives during working time.

(h) Creating the impression that its employees' union activities were under surveillance.

(i) Engaging in surveillance of employees' union activities.

(j) Physically blocking union representatives from talking to or distributing literature to employees at the election on May 8, 2003.

(k) Refusing to furnish to the Union, the names, addresses and telephone numbers of bargaining unit employees, or any other information relevant for bargaining.

(l) In any other manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

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[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Edward Cave, Consuelo Rodriguez and Collette Ballard, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the above named employees plus Leo Sharples and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(c) Upon request, bargain with Allied Trades Council, Division of Local 338, RWDSU/UFCW, AFL-CIO, as the exclusive representative of the employees in the appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Upon request of the Union, furnish the current names, addresses and phone numbers of all employees who are in the appropriate collective bargaining units.

(e) Reimburse the Union for all expenses related to the election in which the ballots were counted on May 29, 2003.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at those facilities in New York where the bargaining unit employees are located, copies of the attached notice marked "Appendix." [24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 14, 2003.

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[24] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated

_____
Raymond Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, transfer, discharge or otherwise retaliate against our employees because of their union activities or because of their desire to refrain from engaging in union activities.

WE WILL NOT interrogate employees about their union activities or how they intend to vote in a union affiliation vote.

WE WILL NOT threaten our employees with discharge, transfer, loss of benefits, or other reprisals unless they vote against the union affiliation vote.

WE WILL NOT promise benefits to our employees if they vote against the union affiliation vote.

WE WILL NOT solicit employees to sign petitions to decertify Allied Trades Council or to show their non-support for the affiliation between Allied Trades Council and Local 338.

WE WILL NOT refuse to allow representatives of Allied Trades Council or Local 338 to visit with employees in the stores.

WE WILL NOT threaten our employees with discharge if they speak to union representatives during working time.

WE WILL NOT in any other manner alter, change or modify the wages or terms and conditions of employment of our employees represented by the Union, without first bargaining in good faith with Allied Trades Council, Division of Local 338, RWDSU/UFCW, AFL-CIO.

WE WILL NOT create the impression that we are engaging in surveillance of our employees' union activities.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT physically block union representatives from talking to or distributing literature to our employees.

WE WILL NOT refuse to furnish to the aforesaid union, information relevant to bargaining, including the names, addresses and telephone numbers of the bargaining unit employees.

WE WILL NOT in any other manner, interfere with, restrain or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer Edward Cave, Consuelo Rodriguez and Collette Ballard full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful actions against the above named employees and Leo Sharples and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

WE WILL on request, bargain with the Union as the exclusive representative of our employees in the appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL upon request of the Union, furnish the names, addresses and telephone numbers of our employees who are in appropriate collective bargaining units.

WE WILL reimburse the Union for all expenses incurred in relation to the election in which the ballots were counted on May 29, 2003.

WE WILL give notice to and offer to bargain with the Union before making any changes in the wages and terms and conditions of employment of the employees in the appropriate bargaining units.

Duane Reade Inc.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
26 Federal Plaza, NY 10278–0104, Telephone 212–264–0346. Hours: 9 a.m. to 5:30 p.m.
THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER

MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER 212-264-0346.